

## CHAPTER 6

# PRETRIAL MATTERS

Pretrial matters take on a significant importance to the successful completion of any trial by court-martial. For a case to go before a court-martial, certain pretrial matters must be accomplished. These pretrial matters extend not only to paper work but also to acts that must be taken care of before the trial. In this chapter we discuss the different types of pretrial matters.

### PRETRIAL PAPER WORK

There are numerous situations in which you will play an important role such as the preparation of charge sheets, pretrial agreements, grants of immunity, individual military counsel requests, witness requests, flyers, findings and sentence worksheets, and seating charts for members. The office you are assigned to depends on what pretrial items you will prepare. However, there is no doubt that you will be involved in some aspect of pretrial paper work.

### CHARGE SHEET

One of your most important pretrial duties is the preparation of the Charge Sheet, DD Form 458, which is shown in figure 6-1. You will most likely draft the charge(s) and specification(s), particularly if there is no judge advocate available.

### Charges and Specifications

The officer conducting a preliminary inquiry on a serious offense usually completes the charge sheet and delivers it with the preliminary inquiry report. Then, if the commanding officer (CO) orders a pretrial investigation, the charge sheet is available for the investigating officer's use. You must prepare this formal written accusation, known as the charges and specifications, before any accused is tried.

The charge lists, by number, the article of the *Uniform Code of Military Justice* (UCMJ) that the accused has allegedly violated. The specification states specifically what the accused did or caused to violate the Code. The specification must allege all the elements of the offense. The specification also contains jurisdictional allegations. Jurisdictional allegations are the facts that show the court has jurisdiction over the

accused and the offense. The specification further identifies the accused and gives the details that form the violation. These details include the where, when, and how of the offense.

Courts-martial have been disapproved on review by higher authority because of faulty or "fatally defective" specifications, even though the accused has been convicted. The *Manual for Courts-Martial* (MCM) contains forms for drafting charges and specifications for most offenses. Do not alter these forms.

**NUMBERING OF CHARGES AND SPECIFICATIONS.—** If there is only one charge, do not number it. If more than one charge exists, number each charge in order using Roman numerals I, II, and so on. Charges that are preferred after other charges have been preferred are called additional charges and are also numbered using Roman numerals. However, the word *Additional* must appear in front of the word *Charge*; for example, Charge I: Violation of the Uniform Code of Military Justice, Article 86; Additional Charge I: Violation of the Uniform Code of Military Justice, Article 86.

In numbering specifications, use Arabic numerals 1, 2, 3, and so on. If there is only one specification under the charge, do not number it. Designate the specifications under additional charges in the same manner as for regular specifications. Do not use the word *Additional with* the specifications.

**DRAFTING OF CHARGES.—** The charge should be appropriate to all specifications under it, and is written: "Violation of the Uniform Code of Military Justice, Article\_\_\_\_," giving the number of the article.

**DRAFTING OF SPECIFICATIONS.—** A specification should be brief but complete and must contain the following essential elements:

- Rate of accused
- Name of accused
- Branch of service of accused
- Unit of accused
- Time of alleged offense based on a 24-hour clock

CHARGE SHEET				
I. PERSONAL DATA				
1. NAME OF ACCUSED (Last, First, MI) Seaman, Able B.	2. SSN 123-45-6789	3. GRADE OR RANK SN	4. PAY GRADE E-3	
5. UNIT OR ORGANIZATION Naval Air Station, Oceana, Virginia Beach, Virginia		6. CURRENT SERVICE		
		a. INITIAL DATE 3 Apr 91	b. TERM 4 years	
7. PAY PER MONTH			3. NATURE OF RESTRAINT OF ACCUSED	
a. BASIC \$920.00	b. SEA/FOREIGN DUTY None	c. TOTAL \$920.00	Restriction Confinement	
			9. DATE(S) IMPOSED 27-28 June 1994 30 June 1994	
II. CHARGES AND SPECIFICATIONS				
10. CHARGE: I VIOLATION OF THE UCMJ, ARTICLE 86				
<p>SPECIFICATION: 1: In that Seaman Able B. Seaman, U.S. Navy, Naval Air Station, Oceana, Virginia Beach, Virginia, on active duty, did, on or about 1 June 1994, without authority, absent himself from his organization, to wit: Naval Air Station, Oceana, located at Virginia Beach, Virginia, and did remain so absent until on or about 27 June 1994.</p> <p>Specification 2: In that Seaman Able B. Seaman, U.S. Navy, Naval Air Station, Oceana, Virginia Beach, Virginia, on active duty, did, at or about 0800 hours, 29 June 1994, without authority, absent himself from his unit, to wit: Naval Air Station, Oceana, located at Virginia Beach, Virginia, and did remain so absent until at or about 0625 hours, 30 June 1994.</p> <p>Charge II: Violation of the Uniform Code of Military Justice, Article 121</p> <p>Specification: In that Seaman Able B. Seaman, U.S. Navy, Naval Air Station, Oceana, Virginia Beach, Virginia, on active duty, did, at Naval Air Station, Oceana, Virginia Beach, Virginia, on or about 26 June 1992, steal a wristwatch, of a value of about \$60.00, the property of Seaman Water T. Door, U.S. Naval Reserve.</p>				
III. PREFERRAL				
11a. NAME OF ACCUSER (Last, First, MI) Boate, Jon T.	b. GRADE LNC	c. ORGANIZATION OF ACCUSER Naval Air Station Oceana, Virginia Beach, Virginia		
d. SIGNATURE OF ACCUSER		e. DATE 1 August 1994		
<p>AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this <u>1st</u> day of <u>August</u>, 19 <u>94</u>, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.</p> <div style="display: flex; justify-content: space-between; margin-top: 20px;"> <div style="width: 45%;"> <p><u>John A. Doe</u> <i>Typed Name of Officer</i></p> <p><u>Lieutenant, U.S. Navy</u> <i>Grade</i></p> <p>_____ <i>Signature</i></p> </div> <div style="width: 45%; text-align: right;"> <p><u>Naval Air Station, Oceana</u> <u>Virginia Beach, Virginia</u> <i>Organization of Officer</i></p> <p><u>Legal Officer</u> <i>Official Capacity to Administer Oath</i> <small>(See R.C.M. 307(b)—must be commissioned officer)</small></p> </div> </div>				

DD FORM 458

EDITION OF OCT 1981 IS OBSOLETE

S/N 0102-LF-000-4580

Figure 6-1A.-Charge Sheet, DD Form 458 (front).

12. On <u>2 August</u> , 19 <u>94</u> , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)		
<u>Mary Christmas</u> <small>Typed Name</small>	<u>Discipline</u> <u>Officer</u>	<u>Naval Air Station, Oceana</u> <u>Virginia Beach, Virginia</u> <small>Organization of Immediate Commander</small>
<u>Chief Legalman, U.S. Navy</u> <small>Grade</small>	<u>Signature</u>	
<b>IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY</b>		
13. The sworn charges were received at <u>1100</u> hours, <u>2 August</u> , 19 <u>94</u> at <u>Naval Air Station, Oceana,</u> <u>Virginia Beach, Virginia</u> <small>Designation of Command or</small>		
<u>Officer Exercising Summary Court-Martial Jurisdiction (Sec R.C.M. 403)</u>		
<u>Very C. Pistol</u> <small>Typed Name of Officer</small>	FOR THE <sup>1</sup> <u>Commanding Officer</u> <u>Executive Officer</u> <small>Official Capacity of Officer Signing</small>	
<u>Commander, U.S. Navy</u> <small>Grade</small>	<u>Signature</u>	
<b>V. REFERRAL: SERVICE OF CHARGES</b>		
14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY <u>Naval Air Station, Oceana</u>	b. PLACE <u>Virginia Beach, Virginia</u>	c. DATE <u>7 August 1994</u>
Referred for trial to the <u>Special</u> court-martial convened by <u>my Special Court-Martial Convening Order</u> <u>1-94 of</u>		
<u>1 August</u> , 19 <u>94</u> , subject to the following instructions: <sup>2</sup> <u>None.</u>		
<u>BY</u> <u>Command or Order</u> <u>XX</u>		
<u>Jack N. Jill</u> <small>Typed Name of Officer</small>	<u>Commanding Officer</u> <small>Official Capacity of Officer Signing</small>	
<u>Captain, U.S. Navy</u> <small>Grade</small>	<u>Signature</u>	
15. On <u>8 August</u> , 19 <u>94</u> , I <del>(XXXXXX)</del> served a copy hereof on (each of) the above named accused.		
<u>Jane A. Doe</u> <small>Typed Name of Trial Counsel</small>	<u>Lieutenant, JAGC, U.S. Naval Reserve</u> <small>Grade or Rank of Trial Counsel</small>	
<u>Signature</u>		
FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken. 2 - See R.C.M. 601(e) concerning instructions. If none, so state.		

DD Form 458 Reverse, 84 AUG

Figure 6-1B.-Charge Sheet, DD Form 458 (back).

- Place of alleged offense
- Statement of facts that allege the offense

In pleading these elements on the charge sheet, you should stick to certain rules such as the following:

- In pleading rate, spell out the words instead of using the abbreviation for the rating; for example, Storekeeper Third Class, Seaman, and Hospitalman Third Class. If the rank or grade of the accused has changed since the date of the alleged offense(s), identify the accused by his or her present rank or grade followed by his or her former rank or grade; for example. In that Seaman John A. Doe, U.S. Navy, then Seaman Apprentice John A. Doe, U.S. Navy . . . .

- Set forth the accused's first name, middle initial or name, and last name in that order. Capitalize the first letters in each name only; for example, Seaman John Adam Doe or Seaman John A. Doe. Charge the accused under the name he or she admits to be his or her true name. If the accused is known by more than one name, use the acknowledged name of the accused. List the true name of the accused first, followed by any known aliases; for example, In that Seaman John A. Doe, alias Seaman John A. Doezyneckyski . . . .

- Never allege the social security number (SSN) of the accused.

- Show the branch of service as U.S. Navy, U.S. Naval Reserve, or U.S. Marine Corps.

- In the unit or organization portion, show only the name of a ship. Do not allege the hull number. Capitalize only the first letter of the ship's name; for example, USS Independence. In alleging shore or overseas activities, give the name and the location of the activity. For overseas activities, you may use FPO or APO numbers instead of the physical location. You can use Roman or Arabic numerals if they are a part of the title of the unit.

- In alleging personal jurisdiction for military members on active duty, the phrase *on active duty* must be added immediately after the description of the accused. Also, for members of Reserve components on active duty, the specification must contain the phrase *on active duty*. Since reservists not on active duty are not subject to the UCMJ, failure to show that the member is on active duty is sufficient cause to raise the question of jurisdiction.

- In alleging times and dates, use a 24-hour clock; that is, time runs 0100, 0200, 0300, up to 2400. Where

the date or exact time is uncertain, use the phrase *at or about* or *on or about*; for example, In that \*\*\*\*\* did, at or about 1223 hours, on or about 17 July 19CY . . . . The exact hour of an offense is not normally alleged in a specification except in certain absence offenses.

- In alleging the place of the offense, if the offense occurred at the accused's unit, allege as "on board said ship" or "at said base." When the offense occurs at a place other than the accused's unit, describe the location of that place in enough detail so no question arises as to its location; for example, at or near the intersection of Third and Garden Streets in the town of Pensacola, Florida.

- Before drafting the specification, you should analyze the facts and refer to the pertinent paragraphs of the MCM. This is where the elements of proof of various offenses appear and examples of the forms of specifications are shown. Include all elements of an offense. Allege any intent or state of mind that is expressly made an essential element of an offense. Thus, where appropriate, allege the offense as having been committed knowingly, willfully, wrongfully, unlawfully, without authority, or dishonorably. One specification should not allege more than one offense. However, if two acts or a series of acts constitute one offense, you may allege them together. For the vast majority of cases, you can use the suggested forms and wording contained in part IV of the MCM. For those few cases where no form is shown, you must make sure you cover all the elements of the offense in the specification,

- U.S. and USS are permissible abbreviations. Do not use any other abbreviations in specifications.

- The specification is typed using the block form in what is called margin-to-margin fashion. After typing your charge line, drop down two lines and begin typing directly under the word *Charge*.

EXAMPLE: Charge: Violation of the UCMJ, Article  
86

Specification: In that . . . . .

**SUFFICIENCY OF SPECIFICATIONS.—** If a specification that the accused has been found guilty fails to allege any offense under the Code, the proceedings as to that specification are a nullity and must be declared invalid. If a specification alleges an offense under the Code, the proceedings as to that specification should not be held invalid solely because the specification is defective. However, if it appears from the record that the accused was misled by the defect or that his or her

substantial rights were otherwise materially prejudiced, appropriate corrective action must be taken. The test of the sufficiency of a specification is not whether it could have been made more definite and certain, but whether the facts alleged and reasonably implied set forth the offense sought to be charged with sufficient clarity to apprise the accused of what he or she must defend himself or herself against. Whether the record is sufficient to enable the accused to avoid a second prosecution for the same offense must also be considered in applying this test.

## Preparation Instructions

The preparation of the charge sheet is a matter for the regulations of the secretary of a department; however, certain rules and considerations have been adopted to make sure there is consistency in the preparation of the charge sheet. In typing the charge sheet use initial caps. Let us take a look at the block-by-block preparation instructions:

Block 1: Name of Accused—Type the accused's last name, first name, and middle initial.

Block 2: SSN—Verify the accused's SSN from his or her enlistment contract and type in as verified.

Block 3: Grade or Rank—Abbreviate the grade or rank of the accused; for example, SN, YN3, BM2, PFC, ENS, or LT.

Block 4: Paygrade—Indicate the accused's paygrade by either an O or E level; for example, E-3, E-4, E-7, O-2, or O-4.

Block 5: Unit or Organization—Type the organization to which the accused is assigned for strength accountability. For example, for ships use the name of ship and hull number, USS Midway (CV 41); for shore activities use the name of activity and geographical location, U.S. Naval Support Activity, Naples, Italy; or Fighter Squadron One Zero One, Naval Air Station, Oceana, Virginia Beach, Virginia.

Block 6: Current Service—Verify these entries from the accused's enlistment contract(s).

a. Initial Date—Example: 1 April 19CY.

b. Term—Example: 3 years, 4 years, or Indefinite.

Block 7: Pay Per Month—Verify this amount with the disbursing or finance office.

a. Basic—Dollar amount. Example: \$1,297.00.

b. Sea/Foreign Duty—Dollar amount. Example: \$100.00. (If there is no sea or foreign duty pay, then type in the word None.)

c. Total—Add up the pay per month and the sea/foreign duty pay and enter the dollar amount. Example: \$1,397.00.

Block 8: Nature of Restraint of Accused—Use one of the following terms: *Restriction*, *Confinement*, or *None*, whichever is applicable.

Block 9: Date(s) Imposed—Show the inclusive dates of any restraint, including the beginning and ending dates. Example: 1-2 August 19CY or 1 May -7 June 19CY.

If the accused is still in restraint on the date you are preparing the charge sheet, show only the date that the restraint began. If the accused is released from restraint status after the charge sheet is typed and before the date of trial, the trial counsel (TC) will amend the entry as appropriate and initial it.

According to the decision rendered in *United States v. Allen*, 17 M.J. 126 (1984), periods of legal pretrial confinement are given a day-for-day credit against any confinement awarded at trial. Additionally, periods of illegal pretrial confinement or restriction that is considered by the military judge to be equal to confinement will be given an additional day-for-day credit. You may also list confinement by civilian authorities. However, it must be related to, or as a result of, the current charges listed on the charge sheet.

Block 10: Charges and Specifications—Use block 10 for stating the charges and specifications alleged against the accused. Prepare the charges and specifications according to part IV, MCM.

Block 11a: Name of Accuser—Type in the accuser's last name, first name, and middle initial.

Block 11b: Grade—List the grade or rate of the accuser. Example: CAPT, ENS, LTJG, LNC, or YN1. You may spell out the grade if room allows.

Block 11c: Organization of Accuser—Type in the activity of the accuser. Example: U.S. Naval Support Activity, Naples, Italy.

Block 11d and e: Signature of Accuser/Date—The accuser will sign and date this entry after swearing to the charges and specifications. The accuser must sign all copies of the charge sheet in the presence of the officer who administers the oath. The accuser, by signing the charge sheet, "prefers" the charges. Any person subject to the Code may prefer charges.

Block 11: Affidavit—Line out information where appropriate.

a. Day, Month, and Year—You may type this entry or leave it blank until the affidavit is signed. Then the officer who signs the affidavit can pen in the information.

b. Typed Name of Officer—Type in this information as the person will sign.

c. Grade—Include armed force and Staff Corps designation (if applicable). Example: LCDR, JAGC, USN, or MAJ, JAGC, USA.

d. Organization of Officer—Refer to the typing instructions given for the accuser in block 11c.

e. Official Capacity to Administer Oath—Only certain officers are authorized to administer oaths. These officers are set forth in (1) Article 136(a), UCMJ, that extends this authorization to all judge advocates; all summary courts-martial; all adjutants; assistant adjutants; acting and personal adjutants; all COs of the Navy, Marine Corps, and Coast Guard; all staff judge advocates (SJAs) and legal officers and acting or assistant SJAs and legal officers; and all other persons designated by regulations of the armed forces or by statute; (2) Section (b) of Article 136, MCM, lists other persons who may administer oaths in the performance of their duties; and (3) *Manual of the Judge Advocate General* (JAGMAN).

This officer must not only witness the accuser's signature on the charge sheet, but must actually administer to the accuser the oath to charges that is set forth in *Rules for Courts-Martial* (R. C, M.) 307, MCM, 1984.

Block 12: Informing Accused of Charges—Line out information where appropriate.

a. Date—This entry will be the date that the accused is formally informed of the charges.

b. Typed Name of Immediate Commander—Type the name of the person who actually informs the accused of the charges. Often, this person is the discipline officer and the block will be marked accordingly.

c. Grade—Refer to the example in the affidavit sections for typing grade.

d. Organization of Immediate Commander—Type in the name of the unit or organization that the person informing the accused belongs to. Example: USS Midway (CV 47) or U.S. Naval Support Activity, Naples, Italy.

e. Signature—This entry will bear the signature of the person who actually informs the accused of the charges. This person personally signs the original charge sheet and all copies. R.C.M. 308, MCM, 1984, states that the accused's immediate commander will cause the accused to be informed of the charges against him or her and the name of the accuser. This is done by the immediate commander personally informing the accused and signing or certifying with his or her signature that he or she has caused this to be done.

Block 13: Receipt for Sworn Charges.

a. Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction—Type in the name of the activity or the name of the officer holding that designation.

b. Typed Name of Officer—Type in the name of the individual who will sign.

c. Grade—Refer to the example for affidavit.

d. Official Capacity of Officer Signing—What position does the individual who is signing hold within the command? Is it adjutant, judge advocate, or personnel officer? The position may be the commander or a subordinate authorized to sign for him or her. When the commander signs personally, strike out the inapplicable words FOR THE appearing above the signature line; for example, ~~FOR THE~~ COMMANDER

e. Date/Hour—The date of receipt of the charges is extremely important. If this date occurs during the running of the statute of limitations, the accused can be tried by court-martial. If this date occurs after the running of the statute of limitations, the accused is not liable to be tried by court-martial. Leave the hours section blank until receipt of the sworn charges has been signed, then the officer signing will pen in the hours entry.

Block 14: Referral of Charges.

a. Designation of Command of Convening Authority—Type in the name of the activity. For ships, type in uppercase and include the hull number.

b. Place—Give the geographical location of all activities other than ships. For ships, leave blank.

c. Date—This entry will be the date that the convening authority (CA) refers the charges for court-martial.

d. Convened by—Type in the convening order number and its date; for example, my Special

Court-Martial Convening Order 1-CY of 1 January 19CY.

e. Subject to the Following Instructions—The CA may have any number of instructions about a case being referred to court-martial. In this event, the CA would state in this section what instructions or conditions are applicable. These instructions could include ( 1 ) that the charges against the accused be tried with certain other charges; (2) that the CA is referring a capital offense as noncapital if the death penalty is not mandatory (when a CA has this discretion to refer a capital case as noncapital, he or she should refer to the criteria found in R.C.M. 1004); (3) that no bad-conduct discharge (BCD) be adjudged; and (4) instructions on amending orders to the court-martial. **NOTE:** You must state all special instructions in the referral.

f. By Command or Order of—Referral will be by the personal order of the CA. In some instances, the CA may not be signing the charge sheet. If this should occur, reflect it by showing the signer's authority.

If the CA is signing (which is usually the case), then this section would be lined out by using slashes. **SPECIAL NOTE:** If the only officer present in the command refers the charges to an summary court-martial (SCM) and serves as SCM officer, complete the referral with this additional comment: Only Officer Present in the Command.

#### Block 15: Service of Charges.

a. Date—Type or handwrite in the date that service upon the accused is made.

b. Typed Name of Trial Counsel—Type in the full name of the TC.

c. Grade or Rank of Trial Counsel—Example: LT, JAGC, USNR (spell out if room allows).

d. Signature—The TC signs his or her name as typed in this block.

If charges are for trial by SCM, this section would reflect that the summary court served the accused. This process would be done by typing slashes through the words *Trial Counsel* and replacing them with the words *Summary Court*.

The TC is responsible for serving the accused. Some items to keep in mind at this point are that you or the TC must actually give a copy of the charges to the accused. Substitute service upon the defense counsel (DC) is not enough. Service should be made immediately after receipt of the charges by the TC. The TC promptly informs the DC that service was made.

Any questions by the accused when served should be referred to the respective DC. Changes or amendments to the charge sheet need to be brought to the attention of the DC. Any charge sheet that is amended or substantially changed must be additionally served upon the accused.

e. Service on Accused "By Direction" of the Trial Counsel—Although the TC is tasked with service of charges upon the accused, the TC may not be able to accomplish this on all occasions. If this situation should occur, follow the steps set forth below:

(1) Service section will reflect all personal information of the TC.

(2) Service "By direction of the Trial Counsel" is shown by leaving the section (caused to be) unmarked.

In time of peace, no person may, over objection, be brought to trial, including an Article 39(a) session, before a general court-martial (GCM) within the period of 5 days after service of charges, or before a special court-martial (SPCM) within a period of 3 days after service of charges.

In computing these dates, exclude the date of service. You will also exclude the date of trial. However, you will include holidays and Sundays. The accused has the right, however, to waive the mandatory waiting period and proceed to trial before the 3- or 5-day period has elapsed.

### **Distribution Requirements**

With one accused prepare at least an original and six copies of the charge sheet. You will distribute them as follows:

1. Original—For insertion in the original record of trial
2. Copies to—TC, DC, military judge, accused, court reporter, and the file

This is a recommended distribution. Numbers may vary depending upon local practices.

### **CONVENING AND AMENDING ORDERS**

Courts-martial are convened by means of a convening order issued by the CA. The convening order must be personally signed by the CA. Without a convening order, no court-martial can be held, with one exception; the exception is when only one officer is attached to a command. In this case, he or she is the

SCM of the command and no order detailing him or her is needed.

A court is usually created to hear several cases, but may in fact hear only one. In detailing a new court, the old court should not be dissolved nor should the old convening order be rescinded or revoked. One good reason for this is if the court that heard a case that was returned for proceedings in revision has been dissolved there can be no proceedings in revision.

Circumstances will determine whether a new court will be convened to hear the case or whether the case will be referred to an existing court. In the first instance, there will be a new convening order prepared. In the latter, a current convening order maybe used, or it may be amended as necessary. Amendments may become necessary when there is an insufficient number of officer members available or when the court may be reduced below a quorum, or when the assignment of enlisted members is required according to the request of an enlisted accused.

### **Preparation**

A convening order for a GCM or an SPCM will designate the type of court-martial and detail the members and may also designate where the

court-martial will meet. If the CA has been designated by the secretary concerned, the convening order will state this. Refer to appendix 6 of the MCM for forms for orders convening courts-martial. Figure 6-2 illustrates a convening order for an SCM. Figure 6-3 shows a convening order for an SPCM. Figure 6-4 shows a convening order for a GCM.

The members, military judge, and counsel may be changed by an authority competent to detail such persons. Changes of the members of the court-martial should be kept to a minimum. If extensive changes are necessary and no session of the court-martial has begun, it may be appropriate to withdraw the charges from one court-martial and refer them to another.

When new persons are added as members or counsel or when substitutions are made as to any members or counsel or the military judge, such persons are detailed in the same manner as original members. An order changing the members of the court-martial, except one that excuses members without replacements, is reduced to writing and is called an amending order. Figure 6-5 shows an SPCM amending order permanently adding officer members to a previously established court. Figure 6-6 shows an SPCM amending order temporarily adding officer members to a previously established court for a

<p style="text-align: center;">DEPARTMENT OF THE NAVY Naval Air Station Norfolk Norfolk, Virginia 23511</p> <p style="text-align: right;">17 July 19CY</p> <p><u>SUMMARY COURT-MARTIAL CONVENING ORDER 1-CY</u></p> <p>Pursuant to authority contained in paragraph 0120c, Judge Advocate General of the Navy Instruction 5800.7C, of 3 October 1990, Lieutenant Water T. Door, U.S. Navy, is detailed a summary court-martial.</p> <p style="text-align: right;">PAUL T. BOAT Commanding Officer Naval Air Station Norfolk Norfolk, Virginia</p>
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**Figure 6-2.-Summary court-martial convening order.**



DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

17 July 19CY

SPECIAL COURT-MARTIAL CONVENING ORDER 1-CY

Pursuant to authority contained in paragraph 0120b, Judge Advocate General of the Navy Instruction 5800.7C, of 3 October 1990, a special court-martial is convened with the following members:

Lieutenant Commander John A. Doe, U.S. Navy;  
Lieutenant Jack R. Frost, U.S. Navy;  
Lieutenant Mary N. Christmas, U.S. Navy;  
Lieutenant Junior Grade Floss A. Brush, U.S. Navy; and  
Chief Warrant Officer Very C. Pistol, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

**Figure 6-3. Special court-martial convening order.**

DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

17 July 19CY

GENERAL COURT-MARTIAL CONVENING ORDER 1-CY

Pursuant to authority contained in paragraph 0120a, Judge Advocate General of the Navy Instruction 5800.7C, of 3 October 1990, a general court-martial is convened with the following members:

Commander John A. Hull, SC, U.S. Navy;  
Lieutenant Commander Open A. Hatch, U.S. Navy;  
Lieutenant Drag A. Line, U.S. Navy;  
Lieutenant Able B. Seaman, U.S. Navy;  
Lieutenant Junior Grade Jane B. Doe, U.S. Navy;  
Ensign Water T. Door, U.S. Naval Reserve; and  
Chief Warrant Officer Paul A. Craft, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

**Figure 6-4. General court-martial convening order.**

DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

26 July 19CY

SPECIAL COURT-MARTIAL AMENDING ORDER 1A-CY

The following members are detailed to the special court-martial convened by order 1-CY, this command, dated 17 July 19CY:

Lieutenant Junior Grade Jane B. Doe, U.S. Navy; and  
Lieutenant Junior Grade John A. Doe, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

Figure 6-5. Special court-martial amending order permanently adding officer members to a previously established court.

DEPARTMENT OF THE NAVY  
Naval Air Station Norfolk  
Norfolk, Virginia 23511

26 July 19CY

SPECIAL COURT-MARTIAL AMENDING ORDER 1A-CY

The following members are detailed to the special court-martial convened by order 1-CY, this command, dated 17 July 19CY, for the trial of Aviation Storekeeper Third Class Very C. Pistol, U.S. Navy, only:

Lieutenant Junior Grade Jane B. Doe, U.S. Navy; and  
Lieutenant Junior Grade John A. Doe, U.S. Navy.

PAUL T. BOAT  
Commanding Officer  
Naval Air Station Norfolk  
Norfolk, Virginia

Figure 6-6. Special court-martial amending order temporarily adding officer members to a previously established court for a specific case only.

specific case only. Figure 6-7 shows an SPCM amending order used to permanently remove officer

members from a previously established court without replacement members. Figure 6-8 shows an SPCM

<p>DEPARTMENT OF THE NAVY Naval Air Station Norfolk Norfolk, Virginia 23511</p> <p>26 July 19CY</p> <p><u>SPECIAL COURT-MARTIAL AMENDING ORDER 1A-CY</u></p> <p>The following members, detailed to the special court-martial convened by order 1-CY, this command, dated 17 July 19CY, are hereby relieved:</p> <p>Lieutenant Mary N. Christmas, U.S. Navy; and Lieutenant Junior Grade Floss A. Brush, U.S. Navy.</p> <p>PAUL T. BOAT Commanding Officer Naval Air Station Norfolk Norfolk, Virginia</p>
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**Figure 6-7.-Special court-martial amending order permanently removing officer members from a previously established court without replacement members.**

<p>DEPARTMENT OF THE NAVY Naval Air Station Norfolk Norfolk, Virginia 23511</p> <p>26 July 19CY</p> <p><u>SPECIAL COURT-MARTIAL AMENDING ORDER 1A-CY</u></p> <p>The following members, detailed to the special court-martial convened by order 1-CY, this command, dated 17 July 19CY, are hereby relieved for the trial of Yeoman Third Class Pull A. Line, U.S. Navy, only:</p> <p>Lieutenant Mary N. Christmas, U.S. Navy; and Lieutenant Junior Grade Floss A. Brush, U.S. Navy.</p> <p>PAUL T. BOAT Commanding Officer Naval Air Station Norfolk Norfolk, Virginia</p>
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**Figure 6-8.-Special court-martial amending order temporarily removing officer members from a previously established court without replacements for a specific case only.**

amending order used to temporarily remove officer members from a previously established court without replacements for a specific case only. Figure 6-9 shows a GCM amending order used to permanently remove an officer member from a previously established court and replace that member with a new officer member.

The previous samples show some of the various types of amending orders and the intended purposes of each different type. These samples can be modified for use in amending either an SPCM or a GCM convening order simply by changing the heading and the body to read the appropriate type of order. Keep in mind, however, that the basic format of these samples will not change regardless of the type of order you are amending.

### **Distribution**

The original convening order and any amendments are inserted in the original record of trial. Provide copies of the convening order and any amending orders to the TC, DC, military judge, court reporter, and the file.

### **PRETRIAL AGREEMENTS**

What is a pretrial agreement? As the name itself indicates, a pretrial agreement is an agreement made

before the trial between the accused and the CA. The agreement stipulates the maximum sentence that the CA will approve in return for a guilty plea of the accused. Actually, it is not quite that simple, as the following discussion will bear out.

### **Purpose**

Pretrial agreements are advantageous to both the government and the accused. By entering into an agreement with the CA, the accused knows in advance the maximum sentence that the CA will approve. On the other hand, through advanced planning, the government can effect savings in money and manpower while also effecting the expeditious administration of justice. Therefore, from the government's viewpoint, savings is the primary purpose of entering into pretrial agreements with accused persons. From the accused person's point of view, he or she has the advantage of knowing beforehand what his or her maximum sentence will be.

This is true provided the accused is in fact guilty and desires to plead guilty.

A pretrial agreement may include (1) a promise by the accused to plead guilty to or to enter a confessional

<p style="text-align: center;">DEPARTMENT OF THE NAVY Naval Air Station Norfolk Norfolk, Virginia 23511</p> <p style="text-align: right;">26 July 19CY</p> <p><u>GENERAL COURT-MARTIAL AMENDING ORDER 1A-CY</u></p> <p>Chief Warrant Officer CWO2 Peter Cottontail, U.S. Navy, is detailed as a member of the general court-martial convened by order number 1-CY, this command, dated 17 July 19CY, vice Lieutenant Jack A. Lantern, U.S. Navy, relieved.</p> <p style="text-align: right;">PAUL T. BOAT Commanding Officer Naval Air Station Norfolk Norfolk, Virginia</p>
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**Figure 6-9.-General court-martial amending order permanently removing an officer member from a previously established court and replacing that member with a new officer member.**

stipulation as to one or more charges and specifications and to fulfill such additional terms or conditions that may be included in the agreement and that are not prohibited and (2) a promise by the CA to do one or more of the following: (a) refer the charges to a certain type of court-martial; (b) refer a capital offense as noncapital; (c) withdraw one or more charges and specifications from the court-martial; (d) have the TC present no evidence as to one or more specifications or portions thereof; and (e) take specified action on the sentence adjudged by the court-martial.

## **Execution of Agreements**

Pretrial agreements may be entered into in both GCMs and SPCMs. No provision exists for entering into a pretrial agreement in SCMs. Pretrial agreement negotiations may be initiated by the accused, DC, TC, SJA, and CA, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy, Government representatives negotiate with the DC unless the accused has waived the right to counsel. In GCMs, the TV works through the CA's SJA in making his or her recommendations about the offer to the CA. However, in SPCMs, this procedure is not required if the CA has no SJA.

After negotiations, if the accused elects to propose a pretrial agreement, the defense submits a written offer. All terms, conditions, and promises between the parties are contained in this offer. The proposed agreement is personally signed by the accused and DC, if any. If the agreement contains any specified action on the adjudged sentence, that action will be set forth on a page separate from the other portions of the agreement.

The CA may either accept or reject an offer of the accused to enter into a pretrial agreement, or may propose by a counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the CA. When the CA has accepted a pretrial agreement, the CA, or an authorized representative such as the SJA or the TC, signs the agreement.

The accused may withdraw from a pretrial agreement at any time. The CA may withdraw from a pretrial agreement under the following circumstances: (1) any time before the accused begins performance of promises contained in the agreement, (2) upon the failure by the accused to fulfill any material promise or condition in the agreement, (3) when inquiry by the

military judge discloses a disagreement as to a material term in the agreement, or (4) if findings are set aside because a pica of guilty is held improvident on appellate review.

A suggested form for such an agreement for GCMs and SPCMs is shown in figure 6-10. See also appendix A-1-h of the *JAG Manual* for an example of a pretrial agreement. You must modify the format of the agreement as necessary to include all the terms of the agreement made between the accused and the CA. No matters that are "understood" between the accused and the CA should be omitted from the written agreement.

Except in an SPCM without a military judge, no member of a court-martial may be informed of the existence of a pretrial agreement. In addition, the fact that an accused offered to enter into a pretrial agreement and any statements made by an accused in connection with that offer, whether during negotiations or during the providence inquiry, may not be disclosed to the members. Also, the court may not be informed of any such agreement made and later rejected by the accused who has decided to plead not guilty at trial. You should use caution to prevent the court from obtaining any unofficial knowledge of the negotiation for, or existence of, a pretrial agreement. However, the military judge is authorized to examine the pretrial agreement in those cases that he or she sits with members. The military judge is not authorized to examine or inquire into that part of the agreement that states the specific sentence agreed upon by the accused and CA in those cases that the military judge hears alone (without members). The existence of a pretrial agreement does not prevent the accused from presenting matter in mitigation and extenuation. Counsel for the accused also has a continuing duty, in spite of a pretrial agreement, to vigorously represent the accused before the court with respect to the sentence to be adjudged.

Actually, the accused benefits in two ways by entering into a pretrial agreement. First, if the court adjudges a greater sentence than provided for in the pretrial agreement, the CA must reduce the sentence according to the terms of the agreement. However, if the court adjudges a lesser sentence than provided for in the pretrial agreement, the CA may not increase the sentence as provided for in the agreement and the accused must only serve the lesser sentence as adjudged by the court. Further information on pretrial agreements is contained in the *JAG Manual*.

MEMORANDUM OF PRETRIAL AGREEMENT  
GENERAL AND SPECIAL COURTS-MARTIAL  
(See JAGMAN 0137)

MEMORANDUM OF PRETRIAL AGREEMENT

UNITED STATES

Place \_\_\_\_\_

v.

Date \_\_\_\_\_

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Rate/Grade)

\_\_\_\_\_  
(SSN)

I, \_\_\_\_\_, the accused in a \_\_\_\_\_ court-martial, do hereby certify:

That, for good consideration and after consultation with my counsel, I do agree to enter a voluntary plea of GUILTY to the charges and specifications listed below, provided the sentence as approved by the convening authority will not exceed the sentence hereinafter indicated by me:

That it is expressly understood that, for the purpose of this agreement, the sentence is considered to be in these parts, namely: the punitive discharge, period of confinement or restraint, amount of forfeiture or fine, and reduction in rate or grade;

That should the court award a sentence which is less, or a part thereof is less, than that set forth and approved in the agreement, then the convening authority, according to law, will only approve the lesser sentence;

That I am satisfied with my defense counsel in all respects and consider him or her qualified to represent me in this court-martial;

That this offer to plead guilty originated with me and my counsel that no person or persons whomsoever have made any attempt to force or coerce me into making this offer or pleading guilty;

That my counsel has fully advised me of the meaning and effect of my guilty pleas and that I fully understand and comprehend the meaning thereof and all of its attendant effects and consequences, including the possibility that I may be processed for an administrative discharge, even if part of or all of the sentence, including a punitive discharge, is suspended or disapproved pursuant to this agreement;

That I understand that I may ask permission to withdraw my plea of guilty at any time before sentence is announced, and that the military judge may, at his discretion, permit me to do so; and

That I understand this offer and agreement and have been advised that it cannot be used against me in the determination of my guilt on any matters arising from the charges and specifications made against me in this court-martial.

That it is expressly understood that the pretrial agreement will become null and void in the event (1) I fail to plead guilty to each of the charges and specifications set forth below, (2) the court refuses to accept my plea of guilty to any of the charges and specifications set forth below, (3) the court accepts each of my pleas but, before the time sentence is announced, I ask permission to withdraw any of my pleas, and the court permits me to do so, and (4) the court initially accepts my plea of guilty to each of the charges and specifications set forth below but, before the time the sentence is adjudged, the court sets aside any of my guilty pleas and enters a plea of not guilty on my behalf.

Figure 6-10.-Memorandum of pretrial agreement for general and special courts-martial.

CHARGES PREFERRED:

GUILTY PLEA BY ACCUSED TO:

Article #

Description

Article #

Description

- 1.
- 2.
- 3.

MAXIMUM SENTENCE TO BE APPROVED BY CONVENING AUTHORITY

See maximum sentence appendix to memorandum of pretrial agreement.

Signed: \_\_\_\_\_  
Name of accused/date and place

Witness: \_\_\_\_\_ (Defense counsel/date/place)

\_\_\_\_\_ Statement of qualification where appropriate

Witness: \_\_\_\_\_ (Name/date/place; statement of qualification of  
additional defense counsel, when used)

The foregoing agreement is [approved] [disapproved].

\_\_\_\_\_  
Signature, grade, and title of convening authority

MAXIMUM SENTENCE APPENDIX TO  
MEMORANDUM OF PRETRIAL AGREEMENT

UNITED STATES

v.

Place \_\_\_\_\_

Date \_\_\_\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Rate/Grade

\_\_\_\_\_  
SSN

Maximum Sentence to be Approved by Convening Authority

1. Punitive Discharge: [character of and, if on probation, term thereof]
2. Confinement or Restraint: [amount and kind]
3. Forfeiture or Fine: [amount and duration]
4. Reduction to: [rate or grade]

Signed: \_\_\_\_\_  
Name of accused/date/place

Witness: \_\_\_\_\_ [Defense counsel/date/place]

Witness: \_\_\_\_\_ [Name, date and place]

Figure 6-10.—Memorandum of pretrial agreement for general and special courts-martial—Continued.

## GRANTS OF IMMUNITY

In certain cases involving more than one participant, the interests of justice may make it advisable to grant immunity, either transactional or testimonial, to one or more of the participants in the offense. Issuance of a grant of immunity is in consideration for an individual testifying for the government or the defense in the investigation and/or the trial of the principal offender. Transactional immunity means immunity from prosecution for any offense or offenses that the compelled testimony relates. Testimonial immunity means immunity from the use of testimony or other information compelled under an order to testify (or any information directly or indirectly derived from such testimony or other information).

The authority to grant either transactional or testimonial immunity to a witness is reserved to officers exercising general court-martial jurisdiction (OEGCMJs). This authority may be exercised in any case, whether or not formal charges have been preferred, and whether or not the matter has been referred for trial. The approval of the Attorney General of the United States on certain orders to testify may be required, as outlined in the following paragraph.

### Procedure

A written recommendation that a certain witness be granted either transactional or testimonial immunity in consideration for testimony essential to the government or to the defense must be sent to the OEGCMJ. A sample proposed grant of immunity request from a TC is shown in figure 6-11. If the case has been referred for trial, the TC sends the recommendation. If the case has not been referred for trial, then the pretrial investigating officer, the counsel or recorder of any other fact-finding body, or the investigator when no charges have been preferred sends the recommendation. The recommendation must state in detail why the testimony of the witness is so essential or material that the interests of justice cannot be served without the grant of immunity. Before acting on the recommendation, the OEGCMJ refers it to his or her SJA for consideration and advice. If approved, a copy of the written grant of immunity must be served upon the accused or his or her DC within a reasonable time before the witness testifies. Additionally, if any witness is expected to testify in response to a promise of leniency, the terms of the promise of leniency must be reduced to writing and served upon the accused or his or her DC in the same manner as a grant of immunity. Figure 6-12 illustrates a sample transactional grant of

immunity. Figure 6-13 shows a sample of a testimonial grant of immunity.

### Civilian Witnesses

When the testimony of a civilian witness is considered necessary at a court-martial, and the civilian witness has refused or is likely to refuse to testify or provide other information on the basis of his or her privilege against self-incrimination, the approval of the Attorney General of the United States, or his or her designee, must be obtained before the OEGCMJ may issue an order to the civilian witness to testify.

In all cases that approval of the Attorney General of the United States is required before issuance of a grant of immunity, the cognizant OEGCMJ sends by message or letter the proposed order to testify and grant of immunity to the Judge Advocate General (JAG).

The order to testify should be in the form set forth in appendix A-1-i(3) of the *JAG Manual* and as shown in figure 6-14. Requests for assistance will be in writing, and you should allow at least 3 weeks for consideration. The request must contain the following:

- Name, citation, or other identifying information of the proceeding in which the order is to be used
- Name of the individual for whom the immunity is requested
- Name of the employer or company that the witness is associated with
- Date and place of birth, if known, of the witness
- FBI number or local police number, if any, and if known
- Whether any state or federal charges are pending against the prospective witness and the nature of the charges
- Whether the witness is currently incarcerated, under what conditions, and for what length of time
- A brief resume of the background of the investigation or proceeding
- A concise statement of the reasons for the request, including the following information:

What testimony the prospective witness is expected to give



17 Apr CY

From: LCDR Jack R. Frost, JAGC, USN, Trial Counsel, Naval Legal Service Office, Norfolk

To: Commander Naval Base, Norfolk

Subj: PROPOSED GRANT OF IMMUNITY ICO UNITED STATES V. SN JOHN A.DOE, U.S. NAVY, 111-11-1111

Ref: (a) JAGMAN, Section 0138

(b) R.C.M. 704, MCM, 1984

1. In accordance with the authority and procedures contained in references (a) and (b), it is recommended that a grant of immunity be extended to SA Jon T. Boate, U.S. Navy, 123-45-6789, in consideration for his testimony at an Article 32 investigation convened by Commanding Officer, Naval Station, Norfolk, Virginia.

2. SA Boate has been tried for his involvement in a larceny of private property and housebreaking. Upon completion of final review, SA Boate could be forced to testify without this grant of immunity. To increase the chances of success in presenting evidence before the Article 32 investigating officer and to strengthen the circumstantial evidence case against SN Doe about the damaging personal property charge, however, it is recommended that SA Boate be granted immunity for his testimony. Removal of the threat of further prosecution for offenses other than those for which he was already tried is also an important factor in this recommendation.

3. It is anticipated that SA Boate will provide key testimony in the case of SN Doe. The larceny and housebreaking charges, of which Boate was a co-conspirator, amount to almost \$5,000.00. Boate will further provide testimony on the damaging of the personal property, as Doe told Boate shortly after the incident what he had done. Additionally, this grant of immunity costs the government nothing in terms of legal advantage or expense.

4. Your signature above your typed name at the base of subject grant will bring it into effect. The proposed grant is attached for your consideration.

JACK R. FROST

Figure 6-11.-Sample request for a proposed grant of immunity.

GRANT OF IMMUNITY

IN THE MATTER OF

\_\_\_\_\_ )

\_\_\_\_\_ )

GRANT OF IMMUNITY

\_\_\_\_\_ )

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the government in the matter of [if charges have been preferred, set forth a full identification of the accused and the substance of all specifications preferred].

2. In consideration of your testimony as a witness for the government in the foregoing matter, you are hereby granted immunity from prosecution for any offense arising out of the matters therein involved concerning which you may be required to testify under oath.

3. It is understood that this grant of immunity from prosecution is effective only upon the condition that you actually testify as a witness for the government. It is further understood that this grant of immunity from prosecution extends only to the offense or offenses that you were implicated in the matter herein set forth and concerning which you testify under oath.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Grade, title

Figure 6-12. Sample transactional grant of immunity.

GRANT OF IMMUNITY  
IN THE MATTER OF

\_\_\_\_\_ )

\_\_\_\_\_ )

\_\_\_\_\_ )

GRANT OF IMMUNITY

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the government in the matter of [if charges have been preferred, set forth a full identification of the accused and the substance of all specifications preferred].

2. In consideration of your testimony as a witness for the government in the foregoing matter, you are hereby granted immunity from the use of your testimony or other information given by you (or any other information directly or indirectly derived from such testimony or other information) against you in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with an order to testify in this matter.

3. It is understood that this grant of immunity from the use of your testimony or other information given by you (or other information directly or indirectly derived from such testimony or other information) against you in any criminal case is effective only upon the condition that you testify under oath as a witness for the government.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Grade, title

Figure 6-13. Sample testimonial grant of immunity.

How this testimony will serve the public interest

Whether the witness has invoked the privilege against self-incrimination, or is likely to invoke the privilege

If the witness is likely to invoke the privilege against self-incrimination, why is it anticipated that he or she will do so

- An estimate as to whether the witness is likely to testify in the event immunity is granted

ORDER TO TESTIFY  
IN THE MATTER OF

\_\_\_\_\_ )

\_\_\_\_\_ )

\_\_\_\_\_ )

ORDER TO TESTIFY

To: (Witness to whom immunity is to be granted)

1. As an officer empowered to convene general courts-martial and pursuant to the provisions of sections 6002 and 6004, Title 18, United States Code, I hereby make the following findings:

a. That (name of witness) possesses information relevant to the pending trial by general court-martial of \_\_\_\_\_, and that the presentation of his or her testimony at this trial is necessary to the public interest; and

b. That it is likely that (name of witness) would refuse to testify on the basis of his privilege against self-incrimination if subpoenaed to appear as a witness.

2. On the basis of these facts, and pursuant to section 6004, Title 18, United States Code, I hereby order (name of witness) to appear and testify before the general court-martial convened for the trial of \_\_\_\_\_. In accordance with section 6002, Title 18, United States Code, no testimony or other information given by (name of witness) (or any information directly or indirectly derived from such testimony or other information) can be used against him or her in any criminal case, except a prosecution for perjury, giving false statement, or otherwise failing to comply with this order.

3. This order is issued with the approval of the Attorney General of the United States set forth in enclosure (1) annexed hereto.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Grade, title

Figure 6-14. Sample order to testify.

After a civilian witness immunized has testified, provide the following information to the United States Department of Justice, Criminal Division, Immunity Unit, Washington, DC 20530, via JAG:

- Name, citation, or other identifying information of the proceeding in which the order was requested
- Date of the examination of the witness
- Name and residence address of the witness
- Whether the witness invoked the privilege against self-incrimination
- Whether the immunity order was used
- Whether the witness testified pursuant to the order
- If the witness refused to comply with the order, whether contempt proceedings were instituted, or are contemplated, and the result of the contempt proceeding, if concluded

Provide a copy of this correspondence with a verbatim transcript of the witness' testimony, properly authenticated by the military judge, to JAG at the conclusion of the trial. No testimony given by a civilian witness following an order to testify can be used against him or her in any criminal case, except a prosecution for perjury, giving a false statement, or failing to comply with the order in some other manner.

In all cases involving national security or foreign relations of the United States, the cognizant OEGCMJ sends in the form prescribed in the *JAG Manual*, section 0139, any proposed grant of immunity to JAG for consultation with the Department of Justice.

### **Forms of Grants of Immunity**

In any case that a military witness is granted transactional immunity, the GCM CA executes a written grant in the form set forth in the *JAG Manual*, appendix A-1-i(1). In any case that a witness is granted testimonial immunity, the GCM CA executes a written grant in the form set forth in the *JAG Manual*, appendix A-1-i(2).

### **REQUEST FOR INDIVIDUAL MILITARY COUNSEL AND WITNESSES**

An accused has the right to request representation by a military counsel of his or her own choosing at an

SPCM or a GCM. The accused also has the right to request any witnesses desired for his or her defense to be made available for the court-martial.

### **Individual Military Counsel**

An accused has the right to be represented before a GCM or an SPCM by civilian counsel and either by the military counsel detailed to him or her or by military counsel of the accused's own selection, if reasonably available. An accused may request a determination of the availability of only one individual military counsel at a time.

A request for a specific individual military counsel should be in writing, showing the duties and location of the requested counsel, if known. The request must clearly state whether there is an existing attorney-client relationship between the accused and the requested military counsel regarding the charge(s) in question. The request also must indicate whether the requested military counsel has any unique or special qualifications pertinent to the case and specify those qualifications in the request. The accused or the detailed DC makes the request and submits it through the TC, if any, to the CA.

If the requested military counsel is a member of the Army, Air Force, Coast Guard, or Navy and there is no claim of an existing authorized attorney-client relationship regarding the charge(s) in question, the CA will promptly deny the request and inform the accused in writing. In all other cases, the CA sends the request to the commander of the requested counsel. For counsel assigned to a naval legal service office (NLSO) detachment, the commander of such counsel is the CO of the cognizant NLSO.

The CA provides that authority with the following information: (1) the nature and complexity of the charges and legal issues involved in the case; (2) the estimated duration of the necessary absence (travel, preparation, and participation in the proceeding); (3) the experience level and any special or unique qualifications of the detailed DC; and (4) other information or comments that are appropriate.

The commander of the requested military counsel determines whether such counsel will be reasonably available. In making that determination, the commander assesses the impact upon the command should the requested counsel be made available. The commander may consider, among others, the following factors: (1) the anticipated duties and workload of the requested military counsel including authorized leave; (2) the estimated duration of the necessary absences; (3)

any unique or special qualifications relevant to the proceedings possessed by the requested counsel; (4) the ability of other counsel to assume the duties of the requested counsel; (5) the nature and complexity of the charges or legal issues involved in the proceedings; (6) the experience level; and (7) any information or comments of the CA. If a determination of unavailability is made, the reasons are set forth in writing and provided to the CA and the accused. The decision whether a requested military counsel will be available to act as an individual military counsel is an administrative determination within the sole discretion of the commander of the requested counsel.

If a determination of unavailability is made regarding a requested individual military counsel, the accused may appeal that decision to the immediate superior in command of the authority who made the determination, via that authority. The basis for such appeal will normally be an abuse of discretion. If, however, the accused claims that the person who made that determination did not have the authority to do so, or did so on the basis of inaccurate or incomplete information, the reviewing authority considers those allegations and, if warranted, directs corrective action. Prompt review of the appeal is required and, after a decision is made, the commander of the requested military counsel, the CA, and the accused are promptly informed of the decision.

## **Witnesses**

The Sixth Amendment to the United States *Constitution* provides “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . .” The TC and the DC have equal opportunity to obtain witnesses and other evidence.

The TC must take timely and appropriate action to provide for the attendance of the witnesses who have personal knowledge of the fact at issue in the case for both the prosecution and defense.

If the TC is satisfied that a prosecution witness on the merits is both relevant and necessary, then the CA should produce the witness for trial. Although the decision belongs to the CA, failure to produce these witnesses may have a harmful impact on the outcome of the case.

The TC arranges for the presence of any witness listed by the defense unless the TC contends that the witness’ production is not required under the rules for

courts-martial. If the TC contends production is not required, the defense can renew the matter at trial before the military judge.

The defense request for the personal appearance of a witness on the merits must be submitted in writing together with a statement signed by counsel requesting the witness. The request must contain (1) the telephone number, if known, as well as the location or address of the witness and (2) a synopsis of the expected testimony of the witness that is enough to show its relevance and necessity.

In determining whether the personal appearance of a defense witness requested on the merits is necessary, the CA and/or the military judge refers to the following factors:

- The issues involved in the case
- The importance of the requested witness to these issues (Does the testimony of the witness tend to prove or disprove a fact in issue in the case?)
- The total impact of the witness’ testimony in light of other witnesses
- The availability of any acceptable evidentiary substitutes for the production of the witness

If the military judge determines that a defense witness is required to be present to testify at a trial either on the merits or at presentencing, the government produces the witness (at government expense) or dismisses the proceedings. The government may secure the attendance of a witness as follows.

**MILITARY WITNESSES.**— Military witnesses in the same location as the trial or other proceedings may be informally requested to attend through their respective COs. If a formal written request is required, it should be sent through the regular channels.

In the event that a military witness is located at a place other than the location of the trial, and travel at government expense is required, the appropriate superior will be requested to issue the necessary orders. Normally, the CA will contact the command that the witness is attached to and will furnish the accounting data for the witness. The cost of travel and per diem of military personnel and civilian employees of the Department of the Navy is charged to the operation and maintenance allotment that supports temporary additional duty (TAD) travel for the CA of the court-martial.

It is a violation of Article 92, UCMJ, for a military witness to refuse to appear at trial after having received a lawful order to do so.

**CIVILIAN WITNESSES.**— Like a military witness, a civilian witness can be given an order to attend a court-martial. This order is called a subpoena. Technically, this subpoena is from the President of the United States to the witness. The TC of a court-martial is authorized to issue a subpoena, in the President's name, to any civilian who is a material witness and is within any part of the United States, its territories, or its possessions. The subpoena is prepared in duplicate on DD Form 453. Figure 6-15 is an example of a properly prepared subpoena. Instructions for completion of the form are contained on the form itself.

The subpoena is not necessary if the witness appears voluntarily at no expense to the United States. Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident of their employment. Appropriate travel orders may be issued for this purpose. A subpoena may not be used to compel a civilian to travel outside the United States and its territories. A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign nationals in a foreign country are not subject to a subpoena. Their presence may be obtained through cooperation of the host nation.

**Warrant of Attachment.**— A warrant of attachment may be necessary to compel a witness to appear. It may, however, be issued only upon probable cause to believe that the witness was duly served with a properly issued subpoena, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willingly neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness' failure to appear. All documents in support of the warrant are attached, together with the charge sheet and convening order.

**Travel Order.**— Civilian witnesses who are employees of the Department of Defense may be directed to appear as a witness in a court-martial as an incident of their employment. If so, appropriate orders may be issued for that purpose. See figure 6-16. The travel order must accompany the service of the subpoena in one original and two copies.

**Payments.**— In processing a payment to a civilian witness, you will have to maintain close coordination with the disbursing office. While disbursing personnel

are responsible for computing and paying travel money to witnesses, the witness may look to you, as an LN, to make sure he or she is properly paid. You may have to assist the witness in filling out his or her claim for travel pay and fees and assemble all the necessary paper work before sending the witness to disbursing for payment. Therefore, if it becomes apparent that you will have a witness to be paid, you should make sure you have had advance contact with disbursing and administrative personnel to know what paper work they require to be sure smooth payments are made when a witness presents his or her claim.

**Messing and Berthing.**— You should make advance arrangements for a witness needing messing and berthing. A military witness is normally berthed in the bachelor enlisted quarters (BEQ) or bachelor officer quarters (BOQ), as appropriate. A civilian witness may be berthed in the BOQ or in civilian facilities at his or her own expense, if available. If possible, you should contact a civilian witness in advance to determine his or her desire concerning messing and berthing.

## Subpoenas

A subpoena is a court order requiring a person to testify in either a civil or criminal case as a witness. As an LN, you may be required to be sure military personnel are served properly with subpoenas and they understand when and if they are entitled to reimbursement.

**ON BEHALF OF THE FEDERAL GOVERNMENT.**— Where Department of the Navy interests are involved and departmental personnel are required to testify for the Navy, the Bureau of Naval Personnel (BUPERS) or Commandant of the Marine Corps (CMC) will direct the command to which the witness is attached to issue TAD orders. Costs of such orders are borne by the command. In the event Department of the Navy interests are not involved, the Navy will be reimbursed by the concerned federal agency.

**ON BEHALF OF THE ACCUSED IN FEDERAL COURT.**— When naval personnel are served with a subpoena and appropriate fees and mileage are tendered, COs should issue no-cost permissive orders unless the public interest would be seriously prejudiced by the member's absence from the command. In those cases where fees and mileage are not tendered as required by the Federal Rules of Criminal Procedure, but the person subpoenaed still desires to attend, the CO is authorized to issue permissive orders at no cost to the government. The individual should be advised that an agreement to

**SUBPOENA**

The President of the United States, to Mrs. Merry Christmas  
(Name and Title of Person being Subpoenaed)

You are hereby summoned and required to appear on the 17th day of July, 19 94, at 9  
Bldg 45, Rm 303  
o'clock A. M., at NAS Pensacola, FL, (Place of Proceeding) (Name and Title of Deposition Officer)

~~Designated to take your deposition~~ (a General court-martial of the United States) (a court of inquiry), appointed  
by General Court-Martial Convening Order 13-94, dated 03 July  
(Identification of Convening Order or Convening Authority)

19 94, to testify as a witness in the matter of United States v. Doe  
(Name of Case)

~~Not being able to~~ (Specific Identification of Documents or Other Evidence)

Failure to appear and testify is punishable by a fine of not more than \$500 or imprisonment for a period not more than six months, or both. 10 U.S.C. § 847. Failure to appear may also result in your being taken into custody and brought before the court-martial (under a Warrant of Attachment (DD Form 454). Manual for Courts-Martial R.C.M. 703(e)(2)(G).

Bring this subpoena with you and do not depart from the proceeding without proper permission.

Subscribed at NAS Pensacola, FL this 6th day of July, 19 94  
L. M. Bad, LT, JAGC, USNR  
(Signature (See R.C.M. 703(e)(2)(C)))

The witness is requested to sign one copy of this subpoena and to return the signed copy to the person serving the subpoena.

I hereby accept service of the above subpoena.

\_\_\_\_\_  
Signature of Witness

NOTE: If the witness does not sign, complete the following:

Personally appeared before me, the undersigned authority, \_\_\_\_\_,  
who, being first duly sworn according to law, deposes and says that at \_\_\_\_\_, on \_\_\_\_\_  
19 \_\_\_\_\_, he personally delivered to \_\_\_\_\_ in person a duplicate of this subpoena.

\_\_\_\_\_  
Grade

\_\_\_\_\_  
Signature

Subscribed and sworn to before me at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

\_\_\_\_\_  
Grade

\_\_\_\_\_  
Official Status

\_\_\_\_\_  
Signature

DD FORM 453  
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reimbursement for any expenses should be effected with the party desiring his or her attendance and that no reimbursement should be expected from the government.

In cases where a service member is to be a witness on behalf of a party to civil action or state criminal action with no federal government interest, the CO normally



# TRAVEL ORDER

Payment of travel allowances is authorized pursuant to 10 U.S.C. § 847 and 28 U.S.C. § 1821. You should travel from Anywhere, OH in sufficient time to arrive at NAS Pensacola, FL on the date and at the time specified. You will be paid fees and expenses for attendance at the specified hearing and travel directly to and from that place. You may travel by ☐ rail, ☒ commercial or military aircraft, ☐ bus, or ☐ privately owned automobile.

You ☒ have ☐ have not been given a "Government Transportation Request" to exchange for commercial tickets. No mileage will be paid for any transportation provided by the Government in kind or by Government Transportation Request. If a Government Transportation Request is not given to you and you travel by commercial carrier at personal expense, reimbursement for your cost of transportation will be limited to:

- The least costly regularly scheduled air service between the points involved; or
- The cost of the rail fare and a lower berth, or the lowest first-class rail accommodation available at the time reservations were made; or
- Actual cost of commercial bus fare.

If you travel by private automobile, you will be reimbursed at the rate of (twenty cents \$ .20) \_\_\_\_\_ a mile, plus the cost of necessary parking fees, bridge, ferry, and other highway tolls incurred while traveling under this travel order. The total reimbursement will be limited to the cost of travel by the usual mode of common carrier, including per diem. Receipts and ticket stubs will be required to support your claim for cost of transportation and subsistence for each item in excess of (\$15.00) \_\_\_\_\_.

☐ You will be traveling to a high-cost area.

The travel regulations designate certain cities as high cost areas. Because your attendance requires travel to one of these cities, you will be authorized an actual expense allowance instead of a per diem allowance. You will be reimbursed for the actual expenses incurred, not to exceed the maximum amount prescribed for the city involved. The expenses may include lodgings, meals, tips to waiters, bellboys, maids, porters, personal laundry, pressing and dry-cleaning, local transportation (including usual tips) between places of lodging and duty; and other necessary expenses. You must itemize your daily actual expenses on your claim and receipts for lodging and any items over (\$15.00) \_\_\_\_\_ are required.

☒ You will not be traveling to a high-cost area.

Because you are not traveling to a high-cost area, you will be entitled to a per diem allowance to cover your expenses for lodging, meals, and incidentals. While traveling and attending the specified hearing within the continental United States, you will be authorized a per diem equal to the daily average you pay for lodging, plus (\$23.00) \_\_\_\_\_ per day for meals and incidentals, rounded off to the next dollar. If the resulting amount is more than the maximum per diem allowable, which is (\$50.00) \_\_\_\_\_, then you will be reimbursed only the maximum per diem authorized. You are required to state on your reimbursement claim that the per diem claimed is based on the average cost to you for lodging while on required travel within the continental United States during the period covered by the claim. Receipts are required for lodging. The per diem allowance for travel overseas is based on rates set by the Department of State or by the Department of Defense, and you will be reimbursed the amount specified for the particular overseas area involved.

You are entitled to an attendance fee of (\$30.00) \_\_\_\_\_ per day under 28 U.S.C. § 1821.

Address any inquiries regarding the matter to: LT I. M. BAD, JAGC, USNR, NLSO, Bldg 45, Naval Air Station, Pensacola, FL 32501

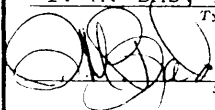
This is travel order number 94-3, dated 6 July 1994, issued by (headquarters) NAS Pensacola, FL  
TDN Accounting Citation XX111112211-XX-0

FOR THE COMMANDER

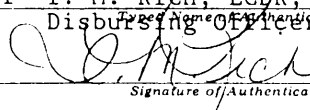
I. M. BAD, LT, JAGC, USNR, Trial Counsel I. M. RICH, LCDR, SC, USN,

Typed Name of Approving Official

Typed Name of Authenticating Official



Signature of Approving Official



Signature of Authenticating Official

Figure 6-16.-Sample DD Form 453-1, Travel Order.

will grant leave or liberty to the person provided such absence will not prejudice the best interests of the naval service. If the member is being called as a witness for a nongovernmental party only because of performance of official duties, the CO is authorized to issue the member permissive orders at no expense to the government.

## **FLYERS, WORKSHEETS, SEATING CHARTS, FORM FOR QUESTIONS BY COURT MEMBERS**

Depending upon your job assignment, you may be required to prepare some or all of these additional pretrial paper work matters. Some are prepared by the court reporter and some by defense or trial paralegals. However, it is essential that you have an understanding of these important pretrial matters.

### **Flyers**

When you type a flyer, list only those charges and specifications that will be before the members. Check with the TC before typing because there might be changes to the charges and specification that you are not aware of.

The flyer is prepared from the charge sheet before the initial Article 39(a) session and contains all pending charges and specifications.

The renumbering of specifications that you provide to the members during preliminary instructions or *voir dire* in partial or mixed plea cases is not required because of the administrative problems and needless confusion that would be created. Instruct the members that they are not to speculate as to why the charges and specifications are numbered as they are. Use two separate flyers—one listing only charges and specifications to be litigated on findings and the other reflecting all the charges and specifications to be presented to the members for sentencing. If, in such circumstance, the DC desires to inform the members of guilty plea specifications, the record will show that the military judge asked for the views of both counsel and that the DC chose to do so for tactical considerations.

If a motion to dismiss or motion for appropriate relief is granted and the charges are amended before the seating of the panel, prepare a new flyer to reflect the amended charges. The panel members will receive only those specifications and charges that the accused is to be tried on. Figure 6-17 shows a sample flyer.

## **Findings Worksheet**

The MCM discusses the findings worksheet in R.C.M. 921, “Discussion.” Ordinarily, a findings worksheet is provided to the members as an aid to putting the findings in proper form. If the military judge examines any writing by the members, or otherwise helps them to put findings in proper form, this is done in open session and counsel is given an opportunity to examine such a writing and to be heard on any instructions the military judge may give.

The findings worksheet is designed to assist the president of a court-martial to properly announce the findings of the court-martial in open session. During an Article 39(a) session, before instructions and argument on findings, counsel for both sides and the military judge decide whether or not they feel that a lesser included offense contained within the charged offenses has been raised during the trial. After this Article 39(a) session, if required, a modified findings worksheet is prepared to reflect the decision of the court as to possible exceptions and substitutions or violations of offenses other than those charged.

The findings worksheet is generally prepared by the TC who should take care that it is tailored to the individual case. (Format for findings is shown in appendix 10 of the MCM.) A sample findings worksheet is shown in figure 6-18. The worksheet is marked as in appellate exhibit and attached to the record of trial.

In preparing the worksheet, each specification is addressed individually, as well as the charge. It is proper to allow for acquittal of all charges and specifications before allowing for conviction of all charges and specifications. This is also true for allowing the members to select Not Guilty before Guilty so as not to show prejudice toward the guilt of the accused.

If the accused pled to a lesser included offense, the members must be informed of that plea since it admits some essential elements that the government would otherwise have to prove. Do not enter findings in a member’s trial on a lesser included offense plea unless the prosecution does not intend to prove the greater offense. If members will decide between the greater and lesser offense, then tailor the worksheet to limit their findings to those choices.

## **SAMPLE FLYER**

**Charge:** Violation of the Uniform Code of Military Justice, Article 86

**Specification 1:** In that Seaman Drag A. Line, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, did, on or about 01 January 19CY, without authority, absent himself from his organization, to wit: Naval Base, located at Norfolk, Virginia, and did remain so absent until on or about 14 February 19CY.

**Specification 2:** In that Seaman Drag A. Line, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, did, on or about 17 February 19CY, without authority, absent himself from his organization, to wit: Naval Base, located at Norfolk, Virginia, and did remain so absent until on or about 04 November 19CY.

**Additional Charge I:** Violation of the Uniform Code of Military Justice, Article 90

**Specification:** In that Seaman Drag A. Line, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, having received a lawful command from Lieutenant Mary N. Christmas, U.S. Navy, his superior commissioned officer, then known by the said Seaman Drag A. Line, U.S. Navy, to be his superior commissioned officer, to "settle down and be quiet," or words to that effect, did, at Naval Base, Norfolk, Virginia, on or about 26 November 19CY, willfully disobey the same.

**Additional Charge II:** Violation of the Uniform Code of Military Justice, Article 121

**Specification:** In that Seaman Drag A. Line, U.S. Navy, Naval Base, Norfolk, Virginia, on active duty, did, at Naval Base, Norfolk, Virginia, on or about 26 November 19CY, steal a purse of a value of about \$120.00, the personal property of Yeoman First Class Jane A. Doe, U.S. Navy.

**APPELLATE EXHIBIT** \_\_\_\_\_

**Figure 6-17.** Sample flyer.

## Sentence Worksheet

The sentence worksheet is designed to help the president of a court-martial to properly announce the

sentence of the court-martial in open court. Normally, the military judge and counsel for the prosecution and defense discuss the maximum permissible punishment for the offenses that the accused has been convicted and

UNITED STATES )

)

v. )

### FINDINGS WORKSHEET

(Name of Accused) )

(Rank and SSN) )

(Unit) )

Note: After the members have reached their findings, the president shall strike all inapplicable language and announce:

(State name and rank of accused) this court-martial finds you:

#### I. ACQUITTAL

Of all Specifications and Charges: Not Guilty.

#### II. FINDING OF NOT GUILTY ONLY BY REASON OF LACK OF MENTAL RESPONSIBILITY

Of (the) Specification (\_\_\_\_) of (the) Charge (\_\_\_\_) and of (the) Charge (\_\_\_\_): Not Guilty only by Reason of Lack of Mental Responsibility

#### III. CONVICTION OF ALL CHARGES

Of all Specifications and Charges: Guilty

#### IV. CONVICTION OF ALL SPECIFICATIONS AND SOME CHARGES

Of all Specification(s) of Charge I: (Not Guilty) (Guilty).

Of Charge I: (Not Guilty) (Guilty)

Of all Specification(s) of Charge II: (Not Guilty) (Guilty)

Of Charge II: (Not Guilty) (Guilty)

#### VI. CONVICTION BY EXCEPTIONS

Of (the) Specification (\_\_\_\_) of Charge I: Guilty, except the words "\_\_\_\_\_" Of the excepted words: Not Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article \_\_\_\_\_)

#### VII. CONVICTION BY EXCEPTIONS AND SUBSTITUTIONS

Of (the) Specification (\_\_\_\_) of Charge I: Guilty, except the words "\_\_\_\_\_" substituting therefor the words "\_\_\_\_\_" Of the excepted words: Not Guilty. Of the substituted words: Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article \_\_\_\_\_)

Figure 6-18.-Findings worksheet.

## VIII. CONVICTION UNDER ONE CHARGE OF OFFENSES UNDER DIFFERENT ARTICLES

Of Specification 1 of (the) Charge (\_\_\_\_): Guilty. Of Specification 2 of (the) Charge (\_\_\_\_): Guilty, except the words “\_\_\_\_\_.”

Of (the) Charge (\_\_\_\_), as to Specification 1: Guilty. As to Specification 2: Not Guilty, but Guilty of a violation of Article \_\_\_\_\_.

**Figure 6-18.—Findings worksheet—Continued.**

any requests for instructions at an Article 39(a) session before instructions and argument on sentencing. After this Article 39(a) session, the sentence worksheet is prepared reflecting the announcement of two-thirds of the members agreeing if the sentence is to confinement for more than 10 years. In the case of a guilty plea by the accused to all charges and specifications, with a panel of members for sentencing, the sentence worksheet can be prepared before the court-martial.

A format for a sentence worksheet is shown in appendix 11 of the MCM and figure 6-19. In a special BCD court-martial, allow for discharge with a BCD. In a GCM, the worksheet also could include confinement for a period of years, forfeiture of all pay and allowances, dishonorable discharge, and dismissal from the service, depending upon the charges and specifications that the accused was convicted of, and the rank of the accused. If you have an accused who is an E-1, do not allow for his or her reduction. The sentence worksheet is labeled as an appellate exhibit and attached to the record of trial.

### **Seating Chart**

The members are seated with the president who is the senior member in the center and the other members alternately to the president's right and left, according to rank.

To prevent confusion for the members upon entering the courtroom, take the time to prepare a seating chart for them and show them the order that they should enter the courtroom for ease in finding their respective seats. Give a copy of the seating chart to the military judge, counsel, and yourself for identification of members during the proceedings.

A sample seating chart is shown in figure 6-20. However, remember that depending upon the configuration of your courtroom this may or may not apply. It is a suggested sample that may need to be tailored.

### **Court-Martial Member's Question Form**

During a member's trial, there maybe times when the member needs to ask questions of a witness or the accused. If this procedure happens, the member must reduce his or her questions to writing and the writing is then inserted into the record of trial as an appellate exhibit. To make this procedure easier for the member and more uniform for the record of trial, a sample member question form is shown in figure 6-21. Prepare enough of these forms in advance and place them on the member's table for easy retrieval.

## **PRETRIAL PROCEDURES**

Other than paper work, there are other pretrial procedures that must be dealt with before the trial of an accused. One situation is the pretrial restraint of the accused and another is evidence.

### **PRETRIAL RESTRAINT**

Immediately upon receipt of the charges or information about a suspected offense, the proper authority must determine the type of restraint, or if restraint is considered necessary. Pretrial restraint usually consists of either restriction to certain specified limits or confinement. Counsel is provided, if requested, to an accused in pretrial confinement before the initial review of the confinement; however, the accused has no right to an individual military counsel.

UNITED STATES )

)

v. )

## SENTENCE WORKSHEET

(Name of Accused) )

(Rank and SSN) )

(Unit) )

Note: After the members or the military judge reaches his or her sentence, the president or the military judge shall strike all inapplicable language and announce:

(State name and rank of accused) this court-martial sentences you:

### NO PUNISHMENT

1. To no punishment.

### REPRIMAND

2. To be reprimanded.

### FORFEITURES, ETC.

3. To forfeit \$\_\_\_\_\_ pay per month for \_\_\_\_\_ (months) (years).
4. To forfeit all pay and allowances.
5. To pay the United States a fine of \$\_\_\_\_\_ (and to serve [additional] confinement of \_\_\_\_\_ [days] [months] [years] if the fine is not paid).

### LOSS OF NUMBERS, ETC.

6. To (lose \_\_\_\_\_ unrestricted numbers) (be placed at the foot of the \_\_\_\_\_'s list of present date and to remain there until you shall have lost unrestricted numbers) (lose \_\_\_\_\_ unrestricted line officer running mate numbers).
7. To lose \_\_\_\_\_ month's seniority in the date of his warrant (as machinist) (\_\_\_\_\_), and to lose corresponding rank in the list of (machinists) (\_\_\_\_\_) of the (Navy) (\_\_\_\_\_).

### REDUCTION OF ENLISTED PERSONNEL

8. To be reduced to \_\_\_\_\_.

Figure 6-19.—Sentence worksheet.

### RESTRAINT AND HARD LABOR

9. To be restricted to the limits of \_\_\_\_\_ for \_\_\_\_\_ (days) (months).
10. To perform hard labor without confinement for \_\_\_\_\_ (days) (months).
11. To be confined for \_\_\_\_\_ (days) (months) (years) (the length of your natural life).
12. To be confined on (bread and water) (diminished rations) for \_\_\_\_\_ days.

### PUNITIVE DISCHARGE

13. To be discharged from the service with a bad-conduct discharge (enlisted personnel only).
14. To be dishonorably discharged from the service (enlisted personnel and noncommissioned warrant officers only).
15. To be dismissed from the service (commissioned officers, commissioned warrant officers, cadets and midshipmen only).

### DEATH

16. To be put to death.

APPELLATE EXHIBIT \_\_\_\_\_

**Figure 6-19.—Sentence worksheet—Continued.**

### Conditions on Liberty

Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Conditions may be imposed in conjunction with other forms of restraint or separately.

### Arrest

Arrest is the restraint of a person by oral or written order, not imposed as punishment, directing the person to remain within specified limits. A person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority,

on duty inconsistent with the status of arrest, but this does not prevent the person arrested from doing ordinary cleaning or policing, or taking part in routine training and duties.

The two most common types of pretrial restraint used in the naval service are restriction in lieu of arrest and confinement (pretrial restriction and pretrial confinement). We will now discuss these and what rights are given to an accused placed under either of these types of restraint.

### Pretrial Restriction (Restriction in Lieu of Arrest)

Pretrial restriction or restriction is the restraint of a person by oral or written orders directing the person to

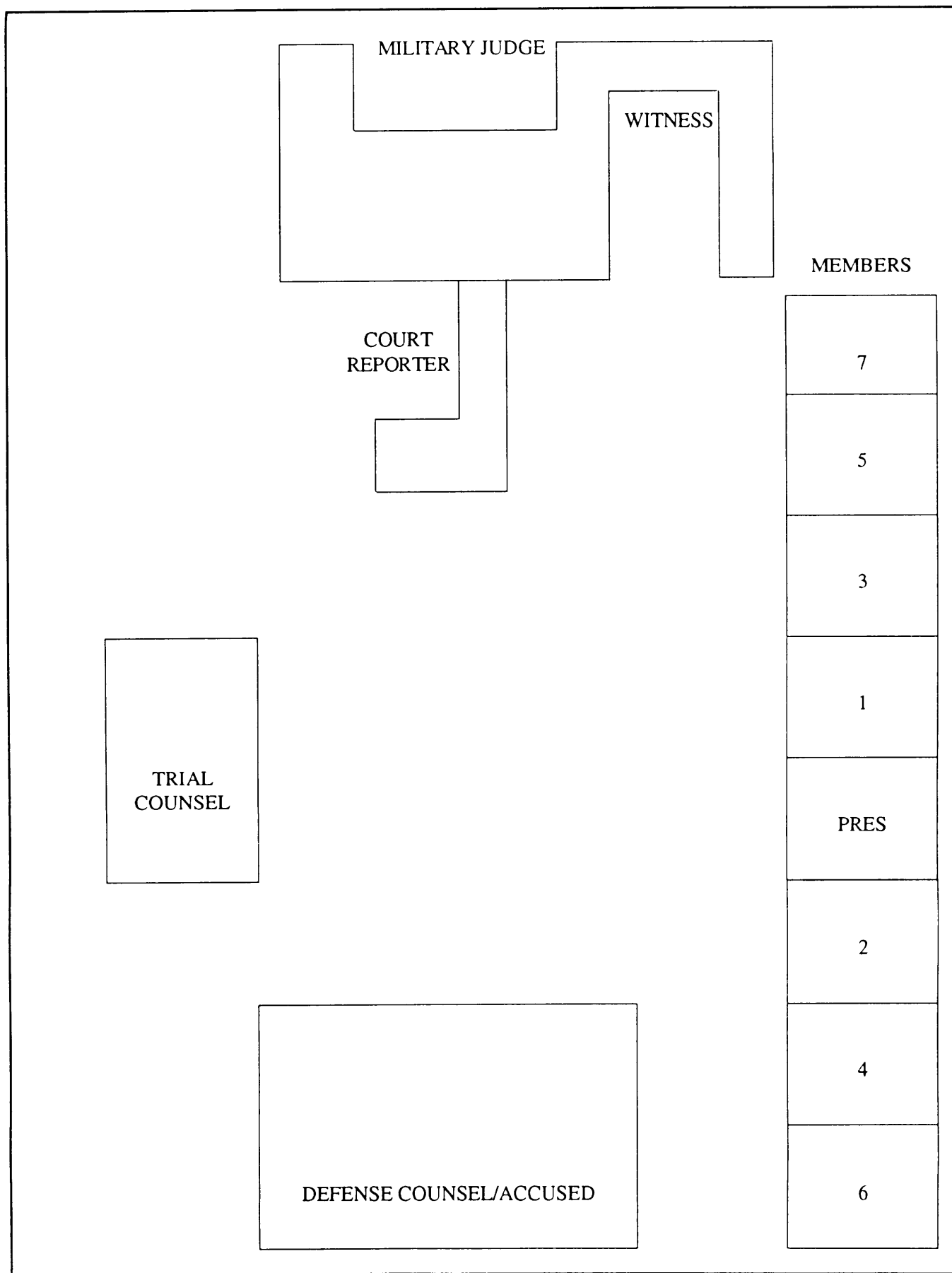


Figure 6-20.-Seating chart.



## QUESTIONS BY COURT MEMBER

For: Witness' Name: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

	NO OBJECTION	OBJECTION
TC		
DC		

\_\_\_\_\_  
COURT MEMBER'S SIGNATURE

**Figure 6-21.-Form for member's questions.**

remain within specified limits. A restricted person must, unless otherwise directed, perform full military duties. Restriction is a less severe restraint on liberty than arrest. Arrest includes a suspension from performing full military duties and the limits of arrest are normally narrower than those of restriction. The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, determines whether it is technically an arrest or restriction. Restriction is the most commonly used type of pretrial restraint when confinement is deemed necessary and is usually issued by written order.

Rule 304 of the MCM, 1984, requires that when a person is placed under restraint, he or she must be informed of the nature of the offense that is the basis for such restraint. The MCM further states that pretrial restraint is not punishment and must not be used as such. A person restrained pending trial may not be punished for the offense that is the basis for the restraint.

Pretrial restriction ends when the CO deems it appropriate to terminate the restriction, upon direct

orders to do so by higher authority or when a sentence is adjudged, the accused is acquitted, or all charges are dismissed.

### **Pretrial Confinement**

Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

The MCM requires that each person confined be promptly informed of the following:

- The nature of the offense for which he or she is held
- The right to remain silent and that any statement made by the person may be used against him or her
- The right to retain civilian counsel at no expense to the government, and the right to request assignment of military counsel free of charge

- The procedures used to review pretrial confinement

Not later than 72 hours after ordering an accused into pretrial confinement, or after receipt of a report that a member of a commander's unit or organization was confined, the commander is to decide whether pretrial confinement will continue. The command is to direct the accused's release unless it believes upon probable cause; that is, upon reasonable grounds, that:

- an offense triable by court-martial was committed,
- the accused committed the offense, and
- confinement is necessary because it is foreseeable that the accused will not appear at trial, pretrial hearing, or investigation, or the accused will engage in serious criminal misconduct, and less severe forms of restraint are inadequate.

A person should not be confined as a mere matter of convenience or expedience. Some factors that should be considered are as follows:

- The nature and circumstances of the offenses charged or suspected, including extenuating circumstances
- The weight of the evidence against the accused
- The accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence
- The accused's character and mental condition
- The accused's service record, including any record of previous misconduct
- The accused's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings
- The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty

In determining if pretrial confinement is the proper form of restraint, the command should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The command can base a decision on oral or written information. This information need not be under oath, but an oath may add to its reliability. The command may examine the accused's personnel

records, police records, and may consider the recommendation of others. Less serious forms of restraint must always be considered before pretrial confinement may be approved. Therefore, the commander should consider whether the accused could be safely returned to his or her unit, at liberty or under restriction, arrest, or conditions on liberty.

If the commander approves continued pretrial confinement, he or she is to prepare a written memorandum justifying continued confinement. The memorandum may include hearsay and may incorporate by reference other documents, such as witnesses' statements, investigative reports, or official records. The commander forwards this memorandum to the reviewing officer. If the commander had prepared a memorandum before ordering confinement, a second memorandum need not be prepared. However, information may be added to the memorandum at any time.

**CONFINEMENT ORDER AND PRETRIAL CONFINEMENTS.**— Most brigades have their own instructions on local requirements such as minimum seabag needs, visiting hours, and release times. Obtain a copy of the local instruction for further guidance. See also the *Navy Corrections Manual*, SECNAVINST 1640.9, and OPNAVINST 1640.6 for all brig procedures.

For pretrial confinees, prepare a Confinement Order, NAVPERS 1640/4. The procedures for the preparation of confinement orders are contained in chapter 8. The only difference in a pretrial confinement order and a posttrial confinement order is that you will fill out the section titled Detained and not the section titled Confined as a Result Of. You also need to fill in the section Pretrial Confinement Necessary. You will normally need an original and three copies. Check the local requirements to determine whether to send dental, medical, and pay records to the brig. Have the accused's division officer or the chief master-at-arms assist the accused in obtaining the seabag requirements for the brig. Check local requirements to determine whether the brig requires TEMADD orders. Do not use temporary duty (TEM DU) orders for pretrial confinement. Have the member escorted to the medical department for the confinement physical. **NOTE:** The doctor must sign the confinement order.

**REVIEW OF PRETRIAL CONFINEMENT.**— As mentioned previously, after the member is confined, the CO must determine, within 72 hours, that continued confinement is warranted. The command should be

prepared to send a knowledgeable representative to the hearing held by the initial review officer (IRO). This representative should be cognizant of (1) the circumstances regarding the charges; (2) the accused's past history for reliability; and (3) unauthorized absences. After the hearing by the IRO, the command will receive a memo either allowing the confinement to continue or ordering the accused's release. If the member is ordered released, the command must comply. A lesser form of restraint may be imposed, but reconfinement may not occur without further misconduct or new evidence that would impact on the accused's reliability. If pretrial confinement is to extend to 30 days, permission for continued confinement must be obtained from the cognizant GCM authority. Make sure permission is received before the expiration of the 30th day, and the request must be reviewed every 30 days after that.

#### **LETTER TO INITIAL REVIEW OFFICER.—**

The OEGCMJ at the location of the confinement facility designates one or more officers of the grade of O-4 or higher to act as the IRO for purposes of pretrial confinement. The IRO maintains a copy of the documents considered and the memorandum prepared under R.C.M. 305(i)(6) in each case until completion of appellate review. The IRO then sends a copy of the documents considered and the memorandum prepared to the OEGCMJ from whom he or she derived the authority as IRO. The officers designated as IROs should be neutral and detached, should be selected for their maturity and experience, and, if practical, should have had command experience. A sample letter from a CO to an initial pretrial review officer is shown in figure 6-22.

**MATTERS CONSIDERED.—** The review by the IRO is a review of the memorandum submitted by the accused's commander. Additional written matters may be considered, included any submitted by the accused, The accused and his or her counsel, if any, can appear before the IRO and make a statement, if possible. A representative of the command may appear before the IRO to make a statement. In most cases, this representative will be you or one of your subordinates.

The IRO may, for good cause, extend the time limit for completion of the initial review to 10 days after pretrial confinement is imposed.

The requirements for confinement discussed previously need not be proven beyond a reasonable doubt, but by a preponderance of the evidence.

**ACTION OF THE IRO.—** When the IRO completes the review, he or she approves continued confinement or orders immediate release. The IRO writes a memorandum that contains conclusions and supporting factual findings. A copy of the memorandum and all documents considered in each case are kept until completion of appellate review. Copies are given to the accused or the government on request. Your office must receive and keep copies for future reference and as part of the accused's court-martial file.

The IRO will, after notice to the parties, reconsider the decision to confine the accused upon a request based upon significant information not previously considered.

If the decision of the IRO is for immediate release, he or she will so notify the accused's CO. The CO then directs the appropriate corrections officer to release the accused immediately, with a copy of the release order forwarded to the OEGCMJ.

The decision of the IRO to release the accused is final and binding upon the CO, corrections officer, and OEGCMJ. No administrative appeal of the IRO's decision is authorized or permissible.

The command may not re-confine unless:

- discovery of a new offense that may authorize pretrial confinement; or
- discovery of any other evidence establishing that the accused will flee to avoid trial; or
- discovery of any other evidence establishing both a lawful basis and a need for pretrial confinement.

Once charges for which the accused has been confined are referred to trial, the military judge reviews the propriety of pretrial confinement. The IRO is divested of authority to order the accused's release or continued pretrial confinement when the charges are referred to a court-martial.

#### **EVIDENCE**

Another very important duty before the trial is the preservation of evidence. Evidence must be maintained until retrieved for trial. Every NLSO has to deal with evidence used in cases tried by court-martial. The proper identifying, safeguarding, and maintaining of this evidence is a critical task that must be performed efficiently and accurately. Sometime in your LN career, you will hear of tales of evidence that were inappropriately safeguarded. To avoid this, you will learn in this section the importance of proper procedures

DEPARTMENT OF THE NAVY  
USS PUGET SOUND (AD 38)  
FPO AE 09544-2520

1640  
Ser 00/  
17 Jul CY

From: Commanding Officer, USS PUGET SOUND (AD 38)

To: Initial Review Officer, Naval Base, Norfolk, Virginia

Subj: PRETRIAL CONFINEMENT ICO YN3 JOHN A. DOE, USN, 123-45-6789

Ref: (a) R.C.M. 305, MCM, 1984

(b) SECNAVINST 1640.10

1. In accordance with references (a) and (b), the following information is provided for the purpose of conducting a hearing into the pretrial confinement of YN3 John A. Doe, USN, 123-45-6789.

a. Hour, date, and place of confinement:

1400, 16 July 19CY, Navy Brig, Naval Base, Norfolk, Virginia

b. Offenses charged:

Violation of UCMJ, Article 86 - Unauthorized absence from USS Puget Sound (AD 38) from 1 September 19CY(-1) until apprehended on 16 July 19CY.

Violation of UCMJ, Article 87 - Missing movement of USS Puget Sound (AD 38) on or about 1 September 19CY(-1).

c. General circumstances:

(1) Petty Officer Doe's absence commenced over liberty that expired on board at 0500, 1 September 19CY(-1). The circumstances, as related by Petty Officer Doe to his division officer, are that YN3 Doe was not going to get underway for a Mediterranean cruise that was to begin on 01 September 19CY(-1). Petty Officer Doe had a pregnant wife at the time of the scheduled departure and his wife did not want to be left alone in the Norfolk area.

(2) Petty Officer Doe was apprehended by Norfolk City Police at 1121, 16 July 19CY, when he was stopped for a speeding violation. He was subsequently turned over to the shore patrol. I found it appropriate to place YN3 Doe in confinement due to the duration of the absence and that the absence was terminated by apprehension. YN3 Doe had every opportunity to turn himself in as he never left the immediate Norfolk area.

d. Previous disciplinary action:

a. CO's NJP, USS Puget Sound (AD 38) on 6 June 19CY(-1). Violation of UCMJ, Article 86 - Leaving appointed place of duty. Awarded 30 days' extra duties.

b. CO's NJP, USS Puget Sound (AD 38) on 11 February 19CY(-1). Violation of UCMJ, Article 86 - Unauthorized absence from unit (approximately 2 days). Awarded 45 days' restriction and 45 days' extra duties.

2. Extenuating or Mitigating circumstances: Wife was pregnant with her first child and did not want to be left alone in a strange city during this period.

3. Due to the aforementioned information, continued pretrial confinement is deemed appropriate in this case. Petty Officer Doe has a history of unauthorized absences that indicates to me the solution to any of his problems is to absent himself without authority. Petty Officer Doe has shown that a lesser form of restraint is inadequate as evidenced by paragraph 2.b. above. Charges have been preferred to trial by special court-martial, and no unusual delay is expected in this case. Given the nature of the offenses charged and the sentence that could be imposed by court-martial for this offense, it is felt YN3 Doe would again flee to avoid prosecution.

PAUL T. BOAT

Figure 6-22.-Sample letter to initial review officer.

for handling evidence from initial receipt to final disposition.

*Black's Law Dictionary* defines evidence as "Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, and so on, for the purpose of inducing belief in the minds of the court or jury as to their contention." Said another way, evidence is anything that tends to prove or disprove any matter in question, or to influence the belief regarding it.

The MCM, 1984, sets forth the rules of evidence to be used before courts-martial. As an LN, you will not be particularly concerned with the rules of evidence. Such matters are best left to the lawyers. However, you will be concerned with preserving evidence for use at trial.

### **Constitutional Requirements**

You have already covered the requirements for taking statements and conducting searches and seizures in chapter 5. Perhaps a review of chapter 5 would be helpful at this point.

Unless the suspect or accused is afforded all the rights that he or she is legally entitled to, any evidence obtained from him or her, whether it be a statement or seized articles, may be contested in court and found inadmissible as evidence. Thus, it is very important that all legal rights be afforded the suspect or accused.

### **Physical Handling of Evidence**

To admit lawfully seized items in evidence at trial they must be authenticated. That is, it must be shown that they are what they purport to be. Sheer administrative convenience dictates that all evidence seized be tagged to indicate the following:

- Date and time of seizure
- Location of article when discovered
- Identification of person, if any, from whom the property was taken
- Name of person seizing evidence
- Name of suspect(s) against whom the evidence may be used

The problem in getting evidence admitted, then, is one of proving to the court that the evidence offered is precisely the same evidence as was seized. Dependent

upon the characteristics of the evidence, in-court identification may be made by either of two means, and how you handle the evidence will depend on what method of in-court identification is contemplated.

If the evidence has a peculiar identifying feature, one familiar with that feature may identify the evidence by that feature in court. The use of a serial number to identify a typewriter is an example of this method of identification. Your sole concern with such evidence is to guarantee its presence in court, and this is done by providing physical security until the trial.

Evidence that does not have such an identifying feature must be treated with greater care. Suspected marijuana cigarettes are an example of this kind of evidence. To demonstrate that the proffered evidence is the same as that seized, the TC will have to show a chain of custody from the time of seizure until the time of trial. The TC will prove his or her evidence by calling a succession of witnesses beginning with the person who made the seizure and ending with the person who delivers the evidence to the court. Each witness will testify how he or she got the evidence; what, if anything, he or she did with it; and to whom he or she delivered it. The necessity of limiting access to the evidence and of keeping a record of those who have had control over the evidence is obvious.

**RECEIPT.**— The Evidence/Property Custody Document, OPNAV 5527/22, is used as the official record of receipt, chain of custody, and final disposition of items of physical evidence. The form normally is prepared with an original and three copies. Entries should be typed or printed in ink. The last or third copy is used as a receipt when evidence is received from an individual. The original and other two copies are presented to the evidence custodian who maintains the original and first copy. The second copy is returned to the investigator (master-at-arms [MAA] or Naval Criminal Investigative Service [NCIS]) for submission of the evidence for inclusion in the case file. An example of a completed evidence custody document is shown in figures 6-23A and 6-23B.

**SAFEGUARDING.**— Each individual in the chain of custody is responsible for the care, safekeeping, and preservation of items of evidence. Because of the sensitive nature of evidence, an evidence custodian assumes responsibility for the evidence when not in use by you or other competent authority involved in the investigation, such as the TC.

The evidence custodian must be a commissioned officer, warrant officer, or an enlisted person E-6 or



NOTE: REMOVE AND REVERSE CARBONS BEFORE COMPLETING THIS SIDE

17. CHAIN OF CUSTODY (CONTINUED)				
ITEM	DATE & TIME	RELEASED BY	RECEIVED BY	PURPOSE
1	1320	NAME John A. Doe, LT	NAME Dep E. Dog, MAC	Returned to evidence custodian
2	07 July CY	ORGANIZATION NLSO Pensacola, FL	ORGANIZATION NASP Investigations	
		SIGNATURE /s/ John A. Doe	SIGNATURE /s/ Dep E. Dog	
1	0940	NAME Dep E. Dog, MAC	NAME Rich L. Guy, SK2	Final disposition
2	08 July CY	ORGANIZATION NASP Investigations	ORGANIZATION NAS Pensacola, FL	
		SIGNATURE /s/ Dep E. Dog	SIGNATURE /s/ Rich L. Guy	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	
		NAME	NAME	
		ORGANIZATION	ORGANIZATION	
		SIGNATURE	SIGNATURE	
18. REMARKS				
19. FINAL DISPOSAL ACTION				
FINAL DISPOSAL AUTHORITY				
Able B. Seaman		CDR, JAGC	Naval Legal Service Office, Pensacola	
NAME (Typed or Printed)		GRADE/RANK	ORGANIZATION	
20. PERSON(S) RECEIVING ITEMS/WITNESSING DESTRUCTION				
	NAME	ORGANIZATION	SIGNATURE/DATE	
1.	Rich L. Guy	NAS Pensacola, FL	/S/ Rich L. Guy, 08 Jul CY	
2.				
3.				
4.				
CONTINUE IN REMARKS IF NECESSARY				
INDICATE IN DISPOSAL ACTION COLUMN (ON FRONT) BY NUMBER AND LETTER CODE PERSON(S) RECEIVING OR WITNESSING ACTION AND TYPE OF ACTION: RETURNED TO INDIVIDUAL OWNER (I); RETURNED TO COMMAND (C); TURNED INTO SUPPLY (S); TO ANOTHER AGENCY (A); TO NIS (N); DESTROYED (D); OTHER METHOD (M). (EXPLAIN IN REMARKS.)				

OPNAV 5527/22 (12-82) BACK

Figure 6-23B.—Evidence/Property Custody Receipt, OPNAV Form 5527/22 (back).

above who is appointed in writing by the CO. The person appointed as evidence custodian should be available to receive and release evidence and attend to other administrative matters as required.

The criteria for appointment and duties of the alternate custodian are the same as those for the custodian. The alternate custodian should assist the custodian and be available when the custodian is not. The custodian and alternate should not be sent TEMADD at the same time or otherwise be absent from the job.

### **Chain of Custody**

The chain of custody begins when an item of evidence is collected, and the chain is maintained until the evidence is disposed of. The chain of custody assures continuous accountability. This accountability is important because, if not properly maintained, an item may be inadmissible in court.

The chain of custody is a chronological written record of those individuals who have had custody of the evidence from its initial acquisition until its final disposition. These persons in the chain of custody must be identified on the OPNAV 5527/22, Evidence/Property Custody Document, which is initiated when the evidence is acquired.

Each individual in the chain of custody is responsible for an item of evidence to include its care, safekeeping, and preservation while it is under his or her control. Because of the sensitive nature of evidence, an evidence custodian is provided to assume responsibility for the evidence when not in use by the investigating officer of other competent authority involved in the investigation; for example, a TC.

### **Evidence Custodian**

The evidence custodian must be a commissioned officer, warrant officer, or an enlisted person appointed on competent orders. The person appointed as the custodian should be available to receive and release evidence and attend to other matters as required.

The criteria for appointment and duties of the alternate custodian are the same as those for the custodian. The alternate is to assist the custodian and is available when the custodian is not. The custodian and alternate should not be absent at the same time. The alternate does not make final disposition on any item of evidence.

## **Records**

The Evidence/Property Custody Receipt, OPNAV Form 5527/22 (fig. 6-23), is issued as the official record of receipt, chain of custody, and final disposition of items of physical evidence.

**EVIDENCE RECEIPT.**— When using this form as an evidence receipt, prepare an original and three copies. Present the original and first copy to the evidence custodian, give the second to the person from whom the evidence was received, and place the third in the report file. When items of evidence gained during one transaction exceed the space allotted on a single form, continue the list on additional forms.

**EVIDENCE VOUCHER.**— The original chain of custody form becomes a voucher and is given a voucher number when it is presented to the evidence custodian. Number evidence vouchers consecutively for each calendar year. Write these numbers in the margin at the bottom right corner of the form. Pencil in the location of the evidence accounted for with the voucher on the bottom left margin of the form and erase and change it whenever the location of the evidence changes; for example, located in evidence room safe, items 1 and 2 in safe, items 3 and 4 in evidence bin No. 6.

Complete the chain of custody section on the evidence voucher whenever any part of the evidence leaves the office, is returned, or a new evidence custodian assumes control. The original evidence voucher should not leave the office except for submission in court. Maintain a duplicate copy in the voucher file to show the disposition of the original.

**EVIDENCE SUBVOUCHER.**— A chain of custody form used as a subvoucher accompanies evidence to record any changes of custody that may occur while the evidence leaves the evidence room. Use a copy of the original evidence voucher or make an extract of the original. Always prepare subvouchers in duplicate with the original accompanying the evidence. Number subvouchers consecutively; for example, SV-1 and SV-2. Add this number to the number of the original voucher. When only part of the items listed on a voucher is to be removed from the evidence room, prepare an evidence subvoucher. Prepare it exactly as the original voucher but include only those items being released in the description of evidence.

**ORIGINATION.**— Rarely if ever will you have to start the original chain of custody receipt. Normally, this is begun at base security or NCIS. Understanding the need for maintaining the chain of custody to properly



safeguard evidence is important for all involved, from the security investigator to the TC. As an LN working in the trial division, you could possibly be responsible for keeping and maintaining evidence. Observing the proper procedures will save a lot of embarrassment for you and the command.

### **Disposition of Evidence**

When no longer needed for a court-martial or other purposes, property of evidentiary value should be disposed of as follows: if the owner of the property is known, and it is legal for him or her to have it, return it; if it is legal to own the property in question, but the owner is unknown, turn the property over to the property disposal officer, unless the property is money, in which case it is turned over to the disbursing officer; and if the property is illegal to have, then destroy it and keep a record of its destruction.

### **PRETRIAL REVIEW OF CHARGE SHEET**

What do you look for when reviewing charge sheets and allied papers before trial? Well, the answer is not standard because every SJA and NLSO operation throughout the world has its uniqueness because of geographical responsibilities. As a senior LN, it will be your responsibility to be able to adapt to these local requirements. The following are the basic procedures that are common to all pretrial reviews.

### **Purpose of Review**

Aside from the routine review of a charge sheet, the critical area is whether or not the specification(s) is/are sufficient. In other words, if a specification of which an accused has been found guilty fails to allege an offense under the UCMJ or shows lack of jurisdiction, the proceedings as to that specification will not be legally valid and have no legal effect. If a specification alleges an offense under the UCMJ, proceedings as to that specification should not be held invalid solely because the specification is defective; however, if it appears from the record that the accused was, in fact, misled by the defect or that his or her substantial rights were otherwise materially prejudiced, appropriate corrective action must be taken.

The test of sufficiency of a specification is not whether it could have been made more definite or certain, but whether the facts alleged and reasonably implied set forth the offense sought to be charged with sufficient clarity to inform the accused of what he or she must defend against. Whether the record is sufficient to

enable him or her to avoid a second prosecution for the same offense must also be considered in applying the test.

### **Sworn Charges**

Once the charges and specifications have been prepared, they are signed and sworn to by the accuser before an officer authorized to administer oaths and must state both that the signer has personal knowledge of, or has investigated, the charges set forth, and that they are true to the best of his or her knowledge and belief. The accuser must be a person subject to the UCMJ. Usually, the CO has the officer who conducted the preliminary investigation sign the charges.

### **Statute of Limitations**

Except for certain offenses, there is a time limit specified in Article 43, UCMJ, within which a person may be charged with an offense. Unless the statute of limitations has been tolled, extended, or suspended, or unless the offense is one for which there is no limitation, sworn charges must be received by the officer exercising SCM jurisdiction over the command within the specified time. See Article 43 for the statute of limitations on all offenses under the UCMJ.

### **Jurisdiction**

An important area of review is jurisdiction. Let's examine jurisdiction and see why it is critical when an offense has been alleged. After all, if the government does not have the jurisdiction over the accused, it cannot try the case.

#### **JURISDICTION OVER THE ACCUSED.—**

Generally speaking, a court-martial has jurisdiction to try only military members on active duty. Therefore, each specification must clearly indicate that the accused is on active duty. Jurisdiction over the accused normally begins with a valid enlistment and ends with delivery of valid discharge papers.

In most cases, there is little doubt that the accused is on active duty; that is, he or she has validly enlisted. However, even when there is no valid enlistment, the accused may still be subject to court-martial jurisdiction. If an enlistment ceremony has occurred, but is for some reason invalid, the doctrine of constructive enlistment may apply; one who acts as if he or she is in the military, accepts the pay and benefits, and wears the uniform, is deemed to be in the military even though his or her original enlistment is invalid for

some reason. Article 2 of the UCMJ now provides a statutory constructive enlistment with four basic requirements as follows:

- Voluntary submission to military authority
- Minimum age and mental competency standards (no one under age 17 may be subject to military jurisdiction by force of law)
- Receipt of military pay or allowances
- Performance of military duties

If these requirements are met, a person is subject to the UCMJ until properly discharged, despite any recruiting defect.

The possibility of the exercise of military jurisdiction ends with the delivery of a discharge certificate with the intent to effect separation. This is true even though the offense was committed while on active duty.

Three potential exceptions exist to the general rule concerning discharge as follows:

- In the very unusual case contemplated by Article 3(a), UCMJ, (serious offenses committed off base overseas), jurisdiction will continue into a subsequent enlistment.
- When a person is discharged before the expiration of his or her term of enlistment for the purpose of reenlistment and, thus, there has been no interruption of his or her active service, court-martial jurisdiction exists to try the member for offenses committed during the prior enlistment. Note, however, that jurisdiction is ended by a discharge at the end of an enlistment even though the service member immediately reenters the service.
- If a person fraudulently obtains the delivery of the discharge papers, jurisdiction is not lost.

#### **JURISDICTION OVER THE OFFENSE.—**

Before the Supreme Court's decision in U.S. v. Soloria it was necessary to show that an offense committed off base had a service connection in order for a court-martial to have jurisdiction. The *Soloria* decision held that the accused's status as a person subject to the UCMJ, and not the subject matter of the offense, was the test for court-martial jurisdiction. Accordingly, it is no longer necessary to plead subject matter jurisdiction in a specification.

## **Review of Supporting Documents**

When reviewing specifications, you should use all the tools at your disposal. Reviewing supporting documents that accompany a charge sheet will ensure the accuracy of your effort. The accused's service record will aid you in determining whether or not there is jurisdiction over the accused. Also, this helps to verify the personal information on page 1 of the charge sheet. Other documents that will help you are shore patrol reports, incident complaint reports, NCIS reports, records of unauthorized absences (NAVPERS 601-6Rs, page 6s), and administrative remarks (NAVPERS 601-13s, page 13s). These documents will help you in determining the correctness of the drafted charge(s) and specification(s).

## **WITNESS INTERVIEWS**

Some aspects of LN duty assignments require you to interview witnesses with the purpose of gathering information much the same as an investigator. In most cases, witnesses have been interviewed by trained investigators before you undertake the task. In any event, the techniques used by you to gather information are universal and effective if applied properly.

### **Interviews**

During the process of gathering information for an investigation, you almost invariably make use of one of the most valuable sources, people; you do so by interviewing them. An interview is the questioning of a person believed to possess knowledge of official interest to the command and the interviewer. In an interview, the interviewer encourages the person questioned to give an account of an incident under investigation in his or her own words and in his or her own way. Interviews are used for the following purposes:

- To establish the facts of a crime that may provide the investigator with leads that will disclose the perpetrator of the crime or offense under investigation or of other crimes committed or both
- To corroborate or disprove statements
- To verify inferences derived from physical evidence
- To link physical evidence of a suspect with a case
- To clear a suspect (develop evidence that eliminates an individual as suspect of committing an offense)

- To secure evidence that may establish the guilt or complicity of a suspect, to help in the recovery of fruits of the crime, or identify accomplices

You must become thoroughly familiar with the military and civilian laws that apply to the specific offense under investigation before conducting an interview. A knowledge of these laws assists you in evaluating the relevancy of information you receive. You must avoid any oversight or mistake that would impair the value of the results of your investigation to the person or agency using the results in a legal action. Often, through questioning a witness about one offense, you may develop investigative leads related to other offenses. This additional information may be of value to other investigative agencies.

Human factors affect success in stimulating the subject to talk and influence the accuracy or truthfulness of the information that you secure from him or her. Evaluate each subject and the evidence he or she furnished; attempt to understand the subject's motivations, fears, and mental makeup; and use your understanding of the subject to gain useful information. In selecting a technique of interview, consider the following factors.

**PERCEPTION AND MEMORY.**— The validity of the information divulged during an interview is influenced by the subject's ability to perceive correctly what happened in his or her presence, to recollect that information, and to transmit it correctly. A mistake made in recalling a particular incident is often caused by the following:

- A weakness in the subject's ability to see, hear, smell, taste, or touch.

- The location of the subject in relation to the incident at the time it occurred. Rarely do two people give the same account of an incident witnessed by them.

- A lapse of time since the occurrence of the incident or the subject having had no reason for attaching much importance to it when it occurred. The account given an incident at a later time is often colored, consciously or unconsciously, by what the subject has heard or seen regarding the incident since it occurred. Furthermore, a subject may fill in the gaps in his or her knowledge of a particular incident by rationalizing what he or she actually did see or hear and may repeat the entire mixture of fabrication and fact to you as the truth. Therefore, a subject should be interviewed as soon as possible after the occurrence of an incident. Even then

all your skill is required to discover what the subject actually observed.

**PREJUDICE.**— When making a statement, the subject may be influenced by prejudice. You should be alert to this possibility and attempt to discover the motivation behind such prejudice. A statement influenced by prejudice should be carefully evaluated and closely examined for reliable information that may be helpful in the investigation.

**RELUCTANCE TO TALK.**— You may meet a person who is reluctant to divulge information. You must legally overcome this reluctance to secure the information you need. The most common reasons for reluctance to talk are as follows:

- Fear of self-involvement. Many persons are unfamiliar with investigative methods to the extent that they are afraid to give the investigator their aid. They may have committed a minor offense that they believe will be brought to light upon the least involvement with authorities. They may have the opinion that the incident that occurred is not their business or that guilt lies jointly on the victim and the accused. They may fear the publicity that may be given to persons involved in any way with criminal cases.

- Inconvenience. Many persons disclaim knowledge of incidents because they do not wish to be inconvenienced by being subjected to questioning or by being required to appear in court.

- Resentment toward authority. This resentment may be present particularly among persons who do not have a positive loyalty to the organized community. Sometimes the resentment manifests itself as sympathy for an accused who is regarded as an underdog pitted against the impersonal, organized forces of society represented by the authorities.

**PERSONALITY CONFLICT.**— The lack of success in an interview may be caused by a personality conflict between the interviewer and the subject. When that is the case, you should voluntarily recognize this fact and, before all chances of success are lost, withdraw in favor of another interviewer. The subject may feel a willingness to talk to the new interviewer after his or her experience with an objectable one.

**REFUSAL TO TALK.**— A recognized weakness of the interview technique is that no person can legally be made to talk if he or she is not willing to do so. No person capable of committing a crime should be expected to confess his or her guilt.

When too many persons are present, the individual being interviewed may be reluctant to divulge all that he or she knows about an incident. Interviewing an individual in the presence of many persons has been held by the courts to constitute duress. On the other hand, someone should be present to witness the questioning, to witness any statement made, and to protect the interviewer against a possible charge of coercion or duress. Normally, not more than two interviewers should be present.

### **Preparing for the Interview**

Prepare yourself adequately to conduct an interview. This preparation is sometimes hasty, consisting of no more than a mental review of your knowledge of the case or of a quick briefing by the investigator who arrived first at the crime scene. When time permits, a more formal preparation is made. Preparation includes the following three elements.

**FAMILIARITY WITH THE CASE.**— You should fix in your mind all that is known of the who, what, when, where, and how of the crime. Pay particular attention to the specific details, especially those that have not become public knowledge.

**FAMILIARITY WITH THE SUBJECT'S BACKGROUND.**— Acquire some background knowledge of the subject before attempting to interview him or her. In the event this is impossible, attempt to obtain the background information during the initial portion of the interview. This knowledge will enable you to adopt a correct approach to the subject and to extract a maximum amount of valuable information from him or her. The actual knowledge will also enable you to test the subject's truthfulness and to impress him or her with the thoroughness of the investigation. Background facts of particular value include the following:

- Age, place of birth, nationality, and race
- Present or former rank (with civilians, status in business or the community)
- Educational level, present duty, and former occupation
- Habits and associates; how and where leisure time is spent
- Information concerning any prior courts-martial or civilian court convictions

### **ESTIMATE OF INFORMATION SOUGHT.**—

Determine in advance, where possible, the information to be sought in the interview. Prepare a set of questions that you can consult unobtrusively during the interview. Design questions to induce the subject to tell his or her story rather than to elicit yes or no answers. Take care neither to overestimate nor underestimate the subject as a source of information.

### **Planning the Interview**

A person is formally interviewed as soon as possible after the incident to obtain information still fresh in his or her mind, to prevent him or her from being threatened or coerced, or to prevent collaboration of testimony between him or her and others.

**TIME OF INTERVIEW.**— The time that is chosen must be convenient to both you and the subject and must allow adequate opportunity for a thorough interview. Improper scheduling will result in a rushed interview in which important details can be overlooked. If an interview is to take place in the home or place of business of the subject, give consideration to the time of day; generally, a time should be selected that will interfere least with the normal activities of the subject and will permit the completion of the interview.

Sometimes, to throw the subject off balance and thereby achieve an important psychological advantage, it is advisable to select a time that will completely disrupt the subject's normal activities. However, take great care to be sure such action does not result in either legal liability on the part of the military or unfavorable comment in the civilian community.

**PLACE OF INTERVIEW.**— You should make every effort to conduct the interview in a place where you have the psychological advantage. Decide on the basis of the facts in each case where you think your chances are best for encouraging the subject to talk. At times it is best to interview a subject among familiar surroundings, such as in his or her home or office, especially if visiting the investigator's office would impose an undue hardship on the subject or tend to disturb him or her unduly.

At other times it is best to hold an interview in your office or in some other place where the subject is deprived of the comfort or ease of familiar environment. At a regular place of interview, you can control the lighting and the physical features of the room and also be able to prevent destructing influences that may affect the subject's ability to conceal wanted information. For an interview with an informer witness whose identity

has not been publicized, it is best to pick a place that will not attract attention to the subject.

## **Introduction and Identification**

Introduce yourself courteously and make certain the subject is aware of your correct identity. Also make certain of the identity of the person before you.

A hasty introduction or an appearance of one at the beginning of the interview may cause an embarrassing situation or may make the subject think that his or her presence is of little importance and that the information he or her is able to give is of little value. A few minutes spent in a proper introduction gives you time in which to evaluate the subject and the approach you have selected; and the subject is given an opportunity to overcome any nervousness and get in a better frame of mind to answer questions.

When the introduction is completed, make a general statement about the case without disclosing any of the specific facts that have been developed.

If appropriate, warn the interviewee of his or her rights. The warning is required only where there is reason to believe that the interviewee is involved in the offense in question or that he or she may be involved in another offense, the investigation or prosecution of which may be jeopardized if the warning is not given.

## **Conducting the Interview**

Interviews are classified as either formal or informal. The informal interview is used primarily at the scene of the crime to screen those persons who have pertinent information about an offense. After establishing that a person does have information regarding the offense or incident, immediately segregate him or her from the others and interview him or her formally as soon as practical. Also, take the names and addresses of all persons in the vicinity for future reference.

The formal interview is conducted to obtain specific information concerning an offense or incident from a person believed to be aware of such information. The formal interview may be conducted at the scene, at a place convenient to the subject, or at your office.

Attitude and actions usually determine the success or failure of the interview. Be friendly and businesslike; try to get the subject into a talkative mood and to guide the conversation toward the subject's knowledge of the case. Permit the subject to tell his or her complete story without unnecessary interruptions. Phrase the questions

to maintain a free flow of talk from the subject. Take care not to coach or lead the subject into merely telling you what you want to hear. Mentally note any inconsistencies and obtain clarification after the subject has completed his or her story. Specific types of approaches are as follows:

- The indirect approach is generally used in the interview. The subject is aware of the reason for the interview and is permitted to discuss the facts with you rather than answer probing questions. He or she is encouraged to talk about the incident and to give a true and complete account of his or her knowledge of it.

- The more direct type of questioning, usually reserved for the interrogation of a suspect, maybe used when the subject shows fear, dislike, or distrust of interviewers; dreads retaliation by criminals; desires to protect friends or relatives; or displays a general unwillingness to talk for reasons best known to himself or herself.

**COMPLAINANTS.**— The complainant is interviewed first, if possible, to find out whether the crime did occur as alleged when interviewing a complainant, be receptive and sympathetic; let the subject know that you recognize the importance of the complaint and intend to take proper action. Be tactful and open-minded toward the subject and his or her complaint, but equally realistic and careful in developing complete information. Attempt to establish the motive for the complaint and determine the subject's relationship to the accused. Be alert to detect any grudge or jealousy. Always assure the complainant that appropriate action will be started promptly and that a complete and thorough investigation will be conducted.

**VICTIMS.**— When interviewing the victim of a crime, particularly a crime of violence, consider the victim's emotional and physical state. A state of shock or hysteria may cause the victim to give a hazy, erroneous, or garbled account of the crime. Wild and unsupported opinions or conclusions regarding the circumstances of persons connected with the crime are often included in the victim's account. Retain an open mind and evaluate each element of the victim's story in relation to the testimony of witnesses and the physical evidence.

**WITNESSES.**— Frequently guide the witness to help him or her to recall and to relate the facts of an incident as they were observed. Try to make him or her realize that he or she has important and necessary information. Design your questioning to develop a detailed account of the witness' knowledge.

Be constantly aware of the human factors that affect a witness' ability to observe and describe actions, articles, or circumstances related to the commission of a crime. The age, emotional stability, prejudices, and general reputation of a witness are important factors. The relation of the witness to the person connected with the crime is extremely important, both from the legal viewpoint and with regard to the reliability of information furnished by the witness.

Avoid questions of a leading nature. Direct yes or no answers to leading question are not valid information on which to base an investigation. An unstable person, a highly suggestible person, or a person whose memory of events is hazy will often give answers that were suggested to him or her by leading questions.

### **Recording the Interview**

Attempt to record the interview for future reference. Interviews can be recorded as a statement initiated by the interviewee, recorded on an electronic recording device, or merely recorded in the form of notes taken by the investigator.

Statements are elicited from persons with pertinent knowledge regarding the offense or incident under investigation. Written statements serve as permanent records of the pretrial testimony of complainants, victims, and witnesses. The written statement may be used in court as evidence to attest to what was told the investigator and to refresh the memory of the maker of the statement or the memory of the investigator.

An electronic recording device provides a convenient means of preserving the content of an interview. The recordings should be carefully kept in their entirety, together with stenographic transcripts made from them. A complete chain of custody should be maintained for all such items as they may later prove valuable in legal proceedings, provided they can be identified and authenticated.

Take notes of the interview. Most persons interviewed have no objection to discreet note-taking. Notes, however, should not be taken until the subject has had the opportunity to tell his or her story completely and to correct any honest mistakes that he or she made in the first telling. Some subjects display annoyance when you divert your attention from them to take notes. Other subjects are reluctant to talk when they know what they say is being recorded. When either of these situations is apparent, the best time to write down the details of an interview is immediately after it is completed.

### **SUMMARY**

By now you should be aware of the various and important tasks involved with pretrial administrative procedures and how they affect the military justice system. Your role as an LN is important to this system, and the invaluable service you provide to your attorneys enhances the morale and efficiency of served commands. Also, keep in mind that the tasks noted throughout this chapter require that you keep current of requirements levied as a result of appellate decisions and congressional actions.